



2010

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Recommended Citation

Theresa M. Beiner, Shift Happens: The U.S. Supreme Court's Shifting Antidiscrimination Rhetoric, 42 U. Tol. L. Rev. 37 (2010).

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SHIFT HAPPENS: THE U.S. SUPREME COURT'S SHIFTING ANTIDISCRIMINATION RHETORIC

*Theresa M. Beiner**

ABSTRACT

THE United States Supreme Court's discourse on discrimination affects how fundamental civil rights—such as the right to be free from gender and race discrimination—are adjudicated and conceptualized in this country. Shortly after Congress passed Title VII of the Civil Rights Act of 1964, the Court established precedent that assumed discrimination, absent some other compelling explanation for employer conduct. While the Court was more reluctant to presume such discrimination by governmental actors, it was deferent to Congress's ability to set standards that would presume discrimination. Over time, however, that presumption and the Court's deference to Congress has dissipated, and today, the Court actually presumes non-discrimination, absent some evidence that shows an employer or governmental actor was intentionally discriminating. This article will describe the shift in the Supreme Court's rhetoric over time, with an eye toward trying to understand why this shift has occurred and what the implications of this shift are for those who have suffered discrimination and wish to pursue their rights in court. In addition, this article will consider non-legal sources to determine whether such a shift is warranted by a decrease in race and gender discrimination in American society.

I. INTRODUCTION

The United States Supreme Court's discourse on discrimination affects how courts adjudicate and the country conceptualizes civil rights—such as the right to be free from sex and race discrimination. Shortly after Congress passed Title VII of the Civil Rights Act of 1964,¹ the main federal statute prohibiting employment

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1. 42 U.S.C. § 2000e (2006).

discrimination, the Court established precedent, at least in theory,² that assumed discrimination on a showing of a disparate racial impact.³ Over the last thirty-some years, however, presumptions of discrimination have dissipated in the Court's jurisprudence, and today, the Court appears to presume nondiscrimination absent some evidence that an employer or governmental actor intentionally discriminated.⁴ In doing so, a majority of the Court has moved away from acknowledging the prevalence of race and sex discrimination in American society and has reconceptualized discrimination as the result of isolated bad actors.⁵

It is not only the Court's Title VII jurisprudence that reflects this shift. The Court's equal protection cases reveal a similar shift in thinking. In early case law, the Court readily acknowledged the prevalence of societal discrimination and Congress's ability to legislate remedies for the present effects of past discrimination.⁶ Its current jurisprudence in this area, however, is quite different. The Court now approaches congressional enactments aimed at discrimination with skepticism. At one time, the Court gave Congress some deference; now, the Court subjects Congress to strict fact-finding rules to justify its enactments under Section 5 of the Fourteenth Amendment.⁷

This is even reflected in the Court's current rationale for affirmative action (which I refer to as "race-conscious programs")⁸ in higher education—

2. I say "in theory" here because some commentators have argued that even the Court in the 1970s did not really design legal rules that would effectively combat discrimination. Thus, while the Court's rhetoric might appear sympathetic to victims of discrimination that does not mean that these victims were experiencing much success in court. See generally Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823 (2008) (arguing that *Brown v. Board of Education* was the last attempt by the Court to eliminate the present effects of past racial oppression); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 322 (1997) (arguing "that the Court never took this presumption [of discrimination] seriously when applying it concretely").

3. See *infra* Part II.A-B.

4. See *infra* Part III.

5. Commentators have noted this phenomenon in Title VII jurisprudence. See, e.g., Tristin K. Green, *Insular Individualism: Employment Discrimination Law after Ledbetter v. Goodyear*, 43 HARV. C.R.-C.L. L. REV. 353, 354 (2008) (Title VII); Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 836 (2005) (referring to sexual harassment in particular). Scholars in the equal protection area recognized a similar phenomenon—the "perpetrator perspective." Under this theory, racial discrimination is conceptualized "as actions [as opposed to conditions] or series of actions, inflicted on the victim by the perpetrator." See Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053 (1978). The focus is on what the perpetrator did rather than on the social conditions that created a victim class. See *id.* As can be expected under such a regime, this makes it difficult for courts to provide broad class-based relief.

6. See *infra* notes 58-72 and accompanying text. That does not mean that the Court was necessarily ready to remedy such discrimination. See also *Washington v. Davis*, 426 U.S. 229, 248-49 (1976).

7. See *infra* Parts III-IV.

8. I use the term "race-conscious program" instead of "affirmative action" because of the salience of the current framing of the term "affirmative action." As Gary Blasi and John Jost point out:

diversity—rather than remedying the effects of past and present persistent discrimination in American society. Diversity, while powerful in the sense that it should (at least in theory) always serve as a rationale for race-conscious programs, weakens claims that discrimination remains prevalent in American society. In so doing, it relieves the collective society of any responsibility for continuing efforts to achieve equality.⁹

Many scholars have registered their disappointment with the Court's current antidiscrimination rhetoric.¹⁰ I describe the shift that has occurred various areas of antidiscrimination law. That the shift occurs in many aspects of antidiscrimination law suggests that the Court takes a systemic approach to these cases, reflecting several common threads throughout each area I consider. Specifically, I discuss the Court's Title VII, equal protection, and Section 5 of the Fourteenth Amendment jurisprudence. This jurisprudence represents a multi-faceted shift in the Court's approach, impacting its cases in a variety of areas.¹¹

The current predominant frame for affirmative action extends only to the current processes by which applicants for scarce positions are selected. However, this frame ignores history, the lingering effects of past discrimination, and the evidence of current and unintended discrimination. Such a frame amplifies the ego justification and group justification motives of white people and men by highlighting the potential zero-sum consequences of affirmative action.

Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119, 1153 (2006). See also Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1066 (2006) (refusing to use "affirmative action" terminology because "it [is] too freighted to be analytically useful"). While the term itself comes from the New Deal's Labor Laws and ultimately more modernly from a speech given by President John F. Kennedy in the 1960s, its current usage is value-laden. See MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 226 (2005) (setting out the history of the term).

9. After *Grutter v. Bollinger*, 539 U.S. 306 (2003), the diversity rationale, in effect, had a twenty-five year statute of limitations. See *id.* at 343 (Justice O'Connor states that race-conscious programs may not be required in twenty-five years). See also Christopher J. Schmidt, *Caught in a Paradox: Problems with Grutter's Expectation that Race-Conscious Admissions Programs Will End in Twenty-Five Years*, 24 N. ILL. U. L. REV. 753, 755 (2004); Annalisa Jabaily, *Color Me Colorblind: Deference, Discretion, and Voice in Higher Education after Grutter*, 17 CORNELL J.L. & PUB. POL'Y 515, 537-38 (2008).

10. See, e.g., Mary Ellen Maatman, *Choosing Words and Creating Worlds: The Supreme Court's Rhetoric and Its Constitutive Effects on Employment Discrimination Law*, 60 U. PITT. L. REV. 1, 48-63 (1998); Selmi, *supra* note 2, at 279 *passim*.

11. I do not take on several areas of law that involve antidiscrimination principles because they are beyond the scope of the article and have been well fleshed out by others. This includes Voting Rights cases and *Batson*-type jury challenges. For articles that discuss these areas, see, e.g., Charles J. Olgetree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1100 (1994) (discussing judicial interpretations in jury selection cases); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 726-27 (1992) (discussing jury selection cases); Selmi, *supra* note 2, at 309-17 (voting rights). Interestingly, some have argued that *Grutter* permits judges to consider the ethnic diversity of jurors in jury selection. See, e.g., Joshua Wilkenfeld, Note, *Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of Grutter v. Bollinger*, 104 COLUM. L. REV. 2291, 2292-93 (2004).

These cases tell powerful stories. As one legal scholar has noted, a judicial decision is the “‘authoritative version’ of ‘a story about what has happened in the world and claim[s] a meaning for it by writing an ending to it.’”¹² Through these cases, the Court currently tells the story that discrimination is a rarity and not a society-wide problem.¹³ For litigants who bring these cases, the Court’s decisions belie the reality of their experiences.

In this article, I chart the shift in the Supreme Court’s rhetoric over the last thirty-some years, suggesting why this shift has occurred and what its implications are for those who suffer discrimination and wish to pursue claims in court. I do this in three main parts. I begin by describing the Court’s early Title VII and equal protection jurisprudence, which appeared to recognize systemic injustice and assign institutional responsibility for race and sex discrimination. This section includes a discussion of the Court’s rhetorical deference to Congress when it enacts anti-discrimination laws; Congress is the principal entity constitutionally designated to combat discrimination under Section 5 of the Fourteenth Amendment. The following section details the shift in the Court’s rhetoric under both Title VII and the Equal Protection Clause from a presumption that discrimination is a widespread social problem to a presumption that discrimination is a rare occurrence, perpetrated by individual bad actors. Finally, I draw upon political science, social science, and larger political and social trends to account for the changes in the Court’s analysis. I suggest that the shift results from a reinvigorated conservative movement, which successfully uses court cases to foster a form of individualism consistent with modern libertarian ideas. Evidence from social science suggests, however, that the shift is not justified by some sweeping “new equality” in American society. Instead, for antidiscrimination law to realize its full potential in promoting equality, it is essential that the Court shift in the opposite direction and reassert itself as the protector of traditionally discriminated against members of minority groups and women.

II. EARLY CASE LAW

A. *Title VII*

The first, and in some ways most obvious, rhetorical shift I consider comes in case law under Title VII of the Civil Rights Act of 1964.¹⁴ Title VII is one of the primary federal antidiscrimination laws forbidding discrimination in employment based on race, color, sex, religion and national origin.¹⁵ In early

12. Maatman, *supra* note 10, at 7 (quoting JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 36 (1985)).

13. *See id.* at 48.

14. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

15. *Id.* § 2000e-2(a). One feature of Title VII that distinguishes it from the Equal Protection Clause of the Fourteenth Amendment is that until 1972, it only applied to discrimination by private employers. States and the federal government were not included within the initial statutory definition of an employer. Congress amended the law in 1972, adding language extending the statute’s coverage to public entities. *See* H.R. REP. NO. 92-238 (1972).

case law, the Supreme Court read Title VII expansively, finding discrimination even in situations in which the employer did not intend to discriminate, as well as in cases in which the plaintiff presented circumstantial evidence of discrimination. Three key cases announced this broad theory of discrimination: *Griggs v. Duke Power Co.*,¹⁶ *McDonnell Douglas Corp. v. Green*,¹⁷ and *International Brotherhood of Teamsters v. United States*.¹⁸ In these cases, the Court's rhetoric presumed discrimination, absent an employer's alternative explanation for the discriminatory effects or implications of its actions. By doing so, the Court recognized that discrimination based on race was widespread among private employers and was the standard operating procedure for many employers.

This recognition began in 1971 with the Court's decision in *Griggs v. Duke Power Co.*¹⁹ *Griggs* established that an employee need not show that an employer intentionally discriminated to prove a claim of race discrimination under Title VII.²⁰ Instead, as long as the employee proved that the employer's policy had a disparate impact based on race, that was sufficient to prove race discrimination and shift the burden to the employer to prove that the policy causing the impact was job related and consistent with business necessity.²¹ There was widespread support among the Justices that this approach was correct: *Griggs* was a unanimous decision by the eight Justices participating in the decision.²²

In *Griggs*, the employer required that employees either pass a standardized test or have a high school diploma to obtain a job or transfer to certain higher paying jobs.²³ This employer had openly discriminated based on race prior to Title VII's enactment.²⁴ Employees (i.e., white employees) who were hired for higher paying departments prior to the new requirements were found to perform the jobs well even if they did not have a diploma.²⁵ The statistics on the effects

16. 401 U.S. 424, 431-32 (1971).

17. 411 U.S. 792, 802 (1973).

18. 431 U.S. 324, 340 (1977).

19. 401 U.S. at 424.

20. *Id.* at 432. Indeed, the statute itself has no "intent" requirement. It simply forbids discrimination. Rather, the Court determined what was meant by discrimination in this context. See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1029-30 (2006).

21. *Griggs*, 401 U.S. at 432.

22. Justice Brennan did not participate in the decision. *Id.* at 436.

23. *Id.* at 427-28.

24. *Id.* at 426-27.

25. *Id.* at 427. The company later added a testing requirement for initial hires in all departments aside from its Labor Department, which was populated by African American employees. See *id.* A job candidate had to pass two professionally prepared aptitude tests in order to be qualified for placement in all departments except Labor. *Id.* at 427-28. The employer used the Wonderlic Personnel Test, which measures general intelligence, and the Bennett Mechanical Comprehension Test. *Id.* at 428. An employee could obtain a transfer if he or she passed these tests even though he or she did not have a high school diploma. *Id.* As the Court held, "Neither [test] was directed [at] or intended to measure the ability to learn [or] perform a particular job." *Id.*

of these requirements were compelling. In North Carolina at the time of the case, 34% of white males completed high school, whereas only 12% of African American males graduated.²⁶ With respect to the standardized test, 58% of white males passed the tests, while only 6% of African Americans did so.²⁷

The Court's rationale revealed its beliefs about the prevalence of discrimination. The Court acknowledged that Title VII aimed to achieve equality of employment opportunities and to remove barriers that had operated in the past to favor an identifiable group of white employees over other employees.²⁸ Thus, an employer could not use facially neutral procedures or tests to "'freeze' the status quo of prior discriminatory employment practices."²⁹ The Court also acknowledged aspects of societal discrimination. For example, the Court noted that African Americans in North Carolina attended inferior schools due to segregation and that this segregation partly accounted for the race-based differences reflected in the test results.³⁰

In its holding, the Court declared, "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."³¹ In this respect, the Court held that Title VII proscribes "practices that are fair in form, but discriminatory in operation."³² The "touchstone is business necessity."³³ The challenged test or criterion, therefore, must relate to job performance or it violates Title VII.³⁴ The Court was willing to presume that the employer had discriminated by a showing of impact on a protected group—in this case, African Americans. On a showing of disparate impact, the Court shifted the burden to the employer to show that the criterion was related to job performance, overcoming the presumption of discrimination by showing that the employer³⁵ instead had a good reason to implement the challenged policies. Thus, the Court's baseline was a presumption that the employer had discriminated.

Similarly, two years later in *McDonnell Douglas Corp. v. Green*, the Court's analytic framework presumed discrimination in a case of individual

at 428. Instead, the score needed to pass was the median score of high school graduates, which meant that it would have selected out about 50% of high school graduates. *See id.* at 432.

26. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n.6 (1971).

27. *Id.*

28. *Id.* at 429-30.

29. *Id.* at 430.

30. *Id.* The Court had already acknowledged this in *Gaston County v. United States*, 395 U.S. 285 (1969), a literacy test voting rights case. *See Griggs*, 401 U.S. at 430.

31. *Griggs*, 401 U.S. at 431.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* Here, neither criterion bore any demonstrable relationship to successful performance of the jobs in question. The vice president of the company said it was instituted to improve the overall quality of the work force. *Id.* However, the evidence showed that employees who did not meet these criteria still "perform satisfactorily." *Id.* at 431-32.

discrimination.³⁶ Again, the unanimous decision reflects the Justices' consensus on this approach. A plaintiff raised a *prima facie* case of discrimination by proving four simple factors:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.³⁷

By merely showing these four factors (which encompass the two most common reasons a person does not get a job—being unqualified or lack of a job opening), the burden shifted to the employer to produce evidence that there was a legitimate reason other than discrimination for the employer's decision.³⁸ The Court held that if the employer met this burden, the employee was given the opportunity to show that the employer's explanation was a pretext for discrimination.³⁹ In so ruling, the Court acknowledged that discrimination might not always be obvious, recognizing that "it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise."⁴⁰

The third case in this trilogy came four years later in *International Brotherhood of Teamsters v. United States*.⁴¹ In this case, the Court acknowledged another inferential theory of discrimination under Title VII—systemic disparate treatment. Under this theory, a plaintiff could use a combination of statistics and individual instances of discrimination to show an employer's "pattern and practice of discrimination."⁴² This combination of evidence created a presumption that the employer discriminated against the entire class of people affected by the particular employer practice.⁴³

36. 411 U.S. 792 (1973).

37. *Id.* at 802.

38. *Id.*

39. *Id.* at 804. The Court provided a list of factors that could be considered in the pretext determination. Included was, for example, whether similarly situated white employees were treated the same. Also listed were plaintiff's treatment during prior employment, any reaction to his "legitimate civil rights activities," and any other "general policy and practice" with respect to minority employees. *Id.* at 804-05. Statistics as well would be helpful. *Id.* at 805.

40. *Id.* at 801. In this case, the plaintiff, who was African American, was laid off in a work force reduction. *Id.* at 794. Plaintiff participated in a "stall-in," which blocked access to defendant's plant, in protest for discriminatory hiring and firing decisions. *Id.* at 794-95. He also may have participated in a "lock-in," although the facts were unclear on this point. *See id.* After the lock-in, McDonnell Douglas advertised for mechanics, the position plaintiff previously held. *Id.* at 796. Plaintiff "applied for re-employment" and was turned down allegedly based on his "participation in the 'stall-in' and 'lock-in.'" *Id.* at 796. In spite of these allegations, the Court remanded the case to provide Green with an opportunity to show that McDonnell Douglas's legitimate non-discriminatory reason—plaintiff's illegal activity—was a pretext for discrimination. *Id.* at 804.

41. 431 U.S. 324 (1977).

42. *Id.* at 337-38.

43. *Id.* at 362.

Teamsters involved a common carrier's pattern of racial discrimination in hiring that affected the opportunities of African Americans and those with Latino surnames.⁴⁴ The employer hired minority employees into lower-paying and less-desirable jobs.⁴⁵ The plaintiffs also alleged discrimination in promotions and transfers.⁴⁶ Indeed, virtually no minority employees worked in the more desirable driver positions.⁴⁷ The defendant questioned generally the use of statistics to prove intentional discrimination and the particular statistics used in this case.⁴⁸ In the course of upholding this theory of discrimination, the Court discussed the use of statistics in proving discrimination, explaining why they are probative:

Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population....

"...In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved."⁴⁹

Thus, the Court was suspicious about statistical imbalances and inferred "clandestine and covert" discrimination from such evidence.

Responding to the plaintiffs' strong statistical case, the employer argued in part that it simply hired the best-qualified applicants.⁵⁰ The Court was unimpressed: "[A]ffirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systemic exclusion."⁵¹ When statistics suggested discrimination, the employer had "to come forth with

44. *Id.* at 329.

45. *Id.*

46. *Id.*

47. *Id.* at 337-38.

48. *Id.* at 340.

49. *Id.* at 340 n.20 (internal citation omitted) (quoting *United States v. Ironworkers Local 86*, 443 F.2d 445, 551 (9th Cir. 1971)). In another footnote, the Court acknowledged that "[t]he far-ranging effects of subtle discriminatory practices have not escaped the scrutiny of the federal courts, which have provided relief from practices designed to discourage job applications from minority-group members." *Id.* at 365 n.51.

50. *Id.* at 342-43 n.24.

51. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342-43 n.24 (1977) (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

evidence dispelling [the] inference” of discrimination.⁵² Otherwise, the Court presumed that the employer had discriminated.⁵³

In *Griggs*, *McDonnell Douglas*, and *Teamsters*, the Court acknowledged that discrimination was prevalent, but often difficult to root out. Because of this difficulty, the Court inferred discrimination in a variety of circumstances, including situations in which the employer did not intend to discriminate.⁵⁴ The rhetorical baseline was a presumption of discrimination.⁵⁵ Either the burden of proof or production shifted to the employer to explain why the presumption of discrimination was incorrect. While the Court was skeptical of assuming discrimination by public entities, the language in some of the equal protection cases suggested that the Court (or, at least, some of its members) acknowledged the prevalence of discrimination and its lingering effects.

B. *Equal Protection Cases*

While the Court created presumptions of discrimination in cases involving private employers under Title VII, cases involving public entities percolated under the equal protection components of the Fifth and Fourteenth Amendments. Unlike the Title VII cases, the Court had a much more difficult time grappling with discrimination by public entities. Thus, these cases were fractured in many instances, often yielding no majority opinion. Themes about the prevalence and effects of discrimination, however, were articulated throughout these early decisions. In many instances, the decisions revealed members of the Court who acknowledged the widespread nature of discrimination in American society as well as the benefits that majority group members—in other words, white Americans—had received as a result of this discrimination. In addition, in instances when the Court feared it was not competent to find a practice discriminatory, it often suggested that Congress could extend antidiscrimination law to encompass more novel theories. Thus, the Court left open the possibility of other, non-judicial avenues for government enforcement.⁵⁶ The equal

52. *Id.* at 359.

53. *Id.* at 359 n.45. As the Court explained, “every post-Act minority group applicant for a line-driver position will be presumptively entitled to relief, subject to a showing by the company that its earlier refusal to place the applicant in a line-driver job was not based on its policy of discrimination.” *Id.* at 362 (footnotes omitted).

54. Some have argued that the disparate impact standard set out in *Griggs* is simply another way at getting at intentional discrimination that would be difficult to prove. *See, e.g.*, *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000) (“In essence, disparate impact theory is a doctrinal surrogate for eliminating unprovable acts of intentional discrimination hidden innocuously behind facially-neutral policies or practices.”).

55. *See Int’l Bhd. of Teamsters*, 431 U.S. at 359 n.45. This does not mean that plaintiffs necessarily had an easy time winning these cases. As Linda Hamilton Krieger has pointed out, courts may be willing to acknowledge the unconscious bias that pervades American society, but may not rule in a plaintiff’s favor based on such analysis. *See Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1169-70 (1995).

56. Section 5 of the Fourteenth Amendment specifically grants Congress the “power to enforce, by appropriate legislation, the provisions of this article,” which includes the Equal

protection cases come in two basic varieties: (1) those challenging actions by state and local governmental entities as violating the Fourteenth Amendment; and (2) those challenging actions by federal actors as violating the Fifth Amendment's equal protection component.⁵⁷ In this section, I take an evolutionary approach, discussing selected cases from the earliest to the most recent.

One of the earliest inferential cases of race discrimination was the 1886 case *Yick Wo v. Hopkins*.⁵⁸ In this case, the Supreme Court held that San Francisco had violated the Equal Protection Clause of the Fourteenth Amendment by repeatedly denying persons of Chinese descent or origin permission to run laundries.⁵⁹ The pattern of discrimination in the case was compelling—San Francisco denied permits to 200 of the Chinese applicants and granted 80 non-Chinese applicants' permits.⁶⁰ Perhaps this case was too easy a case, in part because of its vintage; the city essentially offered no reason for this differential treatment.⁶¹ However, this case did establish the concept that discriminatory intent by public entities (in this case, a city) could be inferred from the circumstances.

In the 1970s, the Court was open to allegations of discrimination by the government and showed respect for Congress's determinations of existing discrimination. For example, in *Frontiero v. Richardson*, the Court struck down a military policy that provided automatic benefits to female dependents of male members of the armed services while female members of the armed services had to prove that their spouses were dependent.⁶² This case was an easy one: The policy was facially discriminatory, so no inference of discrimination was necessary.⁶³ The Court's language is interesting, however, with respect to its concept of discrimination. After detailing the history of *de jure* discrimination against women, Justice Brennan explained that "it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market, and, perhaps most conspicuously, in the political

Protection Clause. U.S. CONST. amend. XIV. For more on the Court's government enforcement perspective, see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Bobbs-Merrill Co. 1962); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001).

57. These cases may reflect less about the Court's approach to antidiscrimination law, and more about its view of the proper roles of the Court and Congress.

58. 118 U.S. 356 (1886).

59. *Id.* at 366.

60. *Id.* at 374.

61. *Id.*

62. 411 U.S. 677 (1973).

63. *Id.* at 686. Similar facially discriminatory cases generally met with success. See, e.g., *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975). There was some doctrinal confusion in this area when the policy benefitted a group that had experienced discrimination. See, e.g., *Kahn v. Shevin*, 416 U.S. 351, 360 (1974) (upholding Florida statute that provided a property tax exemption for widows but not for widowers); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (holding constitutional a navy rule that permitted women a longer period of time than men to achieve mandatory promotion).

arena.”⁶⁴ He also relied in part on the congressional acknowledgment of sex-based discrimination. As he stated:

We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications.... Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.⁶⁵

While claims involving facially discriminatory policies were sometimes successful, the Court was less willing to infer discrimination by public entities, both federal and state. This is obvious in the 1976 case *Washington v. Davis*.⁶⁶ In *Davis*, the Court held that a test’s disparate impact alone on black applicants was insufficient to prove race discrimination by the District of Columbia police department.⁶⁷ The Court acknowledged that sometimes impact may raise an inference of discrimination “because in various circumstances the discrimination is very difficult to explain on nonracial grounds.”⁶⁸ But, the Court further explained that

we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.⁶⁹

In so ruling, the Court distinguished cases in which a neutral rule was applied in a discriminatory fashion, as in *Yick Wo* and jury selection cases.⁷⁰ Absent discrimination in application, from which it was easier to infer intentional discrimination, a neutral policy such as an examination did not give rise to the same inference of discriminatory intent by the government. The Court refused to apply the disparate impact standard developed under Title VII to the plaintiffs’ equal protection claim in this case, stating, “We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this.”⁷¹ Instead, for discrimination to be actionable

64. *Frontiero*, 411 U.S. at 686. Three other Justices agreed with Justice Brennan’s opinion. *Id.* at 678. Justice Stewart concurred, as did Justices Powell, Burger, and Blackmun. Justice Rehnquist was the lone dissenter. *Id.* at 691.

65. *Id.* at 687-88 (citing examples of Congress’s increased sensitivity).

66. 426 U.S. 229 (1976).

67. *Id.* This case was brought under the Fifth Amendment, Section 1981, and the District of Columbia Code. *Id.* at 233.

68. *Id.* at 242.

69. *Id.* (internal citation omitted).

70. *See id.* at 241.

71. *Id.* at 247-48.

under the Fifth Amendment's equal protection component, the Court required plaintiffs to show more than simple impact.⁷²

While the Court refused to impose the standard as a matter of constitutional law, it suggested that Congress could make disparate impact applicable to federal and state entities if it chose to do so. The Court specifically stated that "extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription."⁷³ Thus, while the Court did not impose disparate impact as a matter of constitutional law, it assumed Congress had the authority to apply disparate impact to public entities.⁷⁴ The responsibility for creating antidiscrimination law applicable to public entities rested with Congress. Instead of being a statement about the Court's views about discrimination by governmental entities, this assumption reflects the Court's view about its more limited role as a countermajoritarian branch.⁷⁵ The Court was also deferential to Congress at this time. As I explain below, this deference likewise experienced a shift.⁷⁶

Consistent with the result in *Davis*, the Court reversed a judgment for the plaintiff in a race discrimination case involving refusal to grant a zoning variance to allow low and moderate income housing in an area zoned for single family use.⁷⁷ In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court applied *Davis*, stating that once again impact alone was insufficient to show race discrimination—this time by a municipality's zoning board.⁷⁸ However, the Court did outline a number of factors that, along with impact, might raise an inference of discriminatory intent. The Court included in the list the "historical background of the decision," the "sequence of events leading up to the ... decision,"⁷⁹ any procedural or substantive departures, and

72. *Id.* at 246. Why does the Court depart from the analysis it used in Title VII? The Court provides some hints. First, the Court clearly was concerned with the many federal statutes that might be affected by applying disparate impact to federal actions. *Id.* As it notes, application of disparate impact could invalidate a wide variety of federal laws, including "tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Id.* at 248.

73. *Id.*

74. This is consistent with later case law that is also deferential to Congress in the Fourteenth Amendment area. Specifically, in *City of Cleburne v. Cleburne Living Center, Inc.*, the Court explained:

Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection.

473 U.S. 432, 439-40 (1985).

75. See BICKEL, *supra* note 56, at 16; JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 7-8 (1980).

76. See *infra* notes 281-313 and accompanying text.

77. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270-71 (1977).

78. *Id.* at 266.

79. *Id.* at 267.

any statements in the legislative or administrative history that suggest a discriminatory purpose.⁸⁰ While the Court acknowledged the zoning decision's impact,⁸¹ it did not believe that other evidence suggested discriminatory intent.⁸² Even though the case did not extend disparate impact analysis to state actors, the Court still provided a means for plaintiffs to infer a case of discriminatory intent from the factual circumstances. While some commentators argue that this approach is difficult in practice for plaintiffs,⁸³ some litigants have successfully used *Arlington Heights* to advance antidiscrimination claims.⁸⁴

A similar outcome occurred in a sex-discrimination case brought against the State of Massachusetts. This case challenged a Massachusetts law that provided veterans a hiring preference for civil service jobs.⁸⁵ The lower courts held that the policy was unconstitutional because of its "devastating impact upon the employment opportunities of women."⁸⁶ Even after the Court's decision rejecting disparate impact in *Washington v. Davis*, the district court concluded that the preference was "inherently nonneutral because it favors a class from which women have traditionally been excluded, and that the consequences of the Massachusetts absolute-preference formula for the employment opportunities of women were too inevitable to have been 'unintended.'"⁸⁷

The impact of the law was obvious: At the time Helen Feeney started the lawsuit, over 98% of veterans were male.⁸⁸ Once again, the Court required the plaintiff to show intentional discrimination—that the veteran's preference was set up to advantage men at the expense of women.⁸⁹ While the Court noted that "[i]f

80. *Id.* at 68.

81. *Id.* at 269 (noting that "[m]inorities constitute[d] 18% of the Chicago area population, and 40% of the income groups [would] be eligible" for the proposed project). As of the 1970 Census, only 27 of the 64,000 Arlington Heights' residents were black. *Id.* at 255.

82. *Id.* at 270.

83. See, e.g., Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1152-53 (1991) (citing criticism of intent standard and finding that "expert judgment that plaintiffs would have a low success rate in intent cases is not verifiable by observing all published opinions"). This article included an interesting study of which *Arlington Heights* factors had more or less of an impact on outcomes in federal district courts and the courts of appeal. See *id.* at 1183-93.

84. See *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-89 (1997) (preclearance under Voting Rights Act); *Casteneda v. Partida*, 430 U.S. 482, 493 (1977) (jury selection); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (explaining that discriminatory intent could be inferred from comments by city officials and others with respect to those of the Santeria faith in a First Amendment religious discrimination suit applying the *Arlington Heights* factors); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1221 (2d Cir. 1987) (housing discrimination); *Pryor v. NCAA*, 288 F.3d 548, 563-65 (3d Cir. 2002) (inferring intent to discriminate based on race using *Arlington Heights* factors). For purposes of discussing the Court's rhetorical shift, that *Arlington Heights* results in few plaintiff victories is less important than the Court's acknowledgment that it is possible to use impact and other factors to infer intent. This suggests that the Court understands the prevalence of discrimination.

85. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 259 (1979).

86. *Id.* at 260.

87. *Id.* at 260-61 (quoting *Feeney v. State*, 451 F. Supp. 143, 155 n.6 (D. Mass. 1978)).

88. *Id.* at 270.

89. *Id.* at 277.

the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral,"⁹⁰ ultimately the Court concluded that Massachusetts did have a neutral ground for the preference.⁹¹ The Court was persuaded by the law's impact on both men and women as well as the neutral terms of the statute—it applied to both male and female veterans.⁹² The Court ignored the history of discrimination against women in the military, explaining, "[T]he history of discrimination against women in the military is not on trial in this case."⁹³ The Court conceded that the law's impact on women was not unintended in the sense that it was unforeseeable or "not volitional"; however, that did not mean the legislature had a discriminatory purpose.⁹⁴ And so arrived one of the most commonly quoted portions of the decision: "[Discriminatory purpose] implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group."⁹⁵

While Helen Feeney lost her case, the Court still acknowledged that "[c]ertainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the Massachusetts law], a strong inference that the adverse effects were desired can reasonably be drawn."⁹⁶ Here, however, the inference was not borne out by the State's reasons for creating the preference—a desire to help veterans.⁹⁷ The plaintiff conceded that this reason was legitimate.⁹⁸ Further, the legislative history suggested no desire to harm women.⁹⁹ Thus, the "inference simply fail[ed] to ripen into proof."¹⁰⁰ Justices Marshall and Brennan dissented in the case, arguing that where the plaintiff shows impact, the state should have the burden to prove that sex played no role in its decision to implement the veteran's preference.¹⁰¹ Here, Justice Marshall believed that Massachusetts did not meet that burden in part because the law exempted certain traditionally female job categories.¹⁰² Thus,

90. *Id.* at 275.

91. *Id.*

92. *Id.* at 276-77.

93. *Id.* at 278.

94. *Id.*

95. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

96. *Id.* at 279 n.25.

97. *Id.*

98. *Id.* at 277.

99. *Id.* at 278.

100. *Id.* at 279 n.25. Some commentators have suggested that the Court failed to ask the correct question. Instead of asking whether the Massachusetts legislature enacted this law in part because it harmed the employment opportunities of women, it should have asked whether the Massachusetts legislature would have enacted this law if 98% of its beneficiaries were women. See Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1038 (1987) (suggesting that this would be the question to ask and arguing that asking it is problematic).

101. *Feeney*, 442 U.S. at 284 (Marshall, J., dissenting).

102. *Id.* at 284-85.

Justice Marshall concluded that Massachusetts “created a gender-based civil service hierarchy, with women occupying low-grade clerical and secretarial jobs and men holding more responsible and remunerative positions.”¹⁰³ The dissenters inferred discrimination from this fact pattern.¹⁰⁴

While the Court was conclusive in its approach to disparate impact, “race-conscious programs” were an area of confusion in the Court’s equal protection jurisprudence. In 1978, in *Regents of the University of California, Davis v. Bakke*, the Court reached a splintered decision that ultimately invalidated a set-aside program used by the University of California at Davis Medical School for disadvantaged applicants, including members of racial minority groups.¹⁰⁵ Justice Powell’s opinion in the case ultimately became influential in current race-conscious program jurisprudence.¹⁰⁶ While he adopted strict scrutiny for racial classifications under the Fourteenth Amendment, he recognized that obtaining a diverse student body was a compelling government interest.¹⁰⁷ He also assumed that university administrators acted in good faith in creating such programs.¹⁰⁸ According to Justice Powell, the U.C. Davis program was unconstitutional because it was not narrowly tailored.¹⁰⁹

In reaching this conclusion, Powell questioned the Court’s competence to determine which groups merit special treatment.¹¹⁰ While the Court lacked expertise in this regard, he noted that nothing in the case called into question Congress’s ability to create such programs. Justice Powell explained, “We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”¹¹¹ He also acknowledged, “We have previously recognized the special competence of Congress to make findings with respect to the effects

103. *Id.* at 285. Justice Marshall also argued that the preference was not substantially related to an important government objective—the standard used for sex discrimination under the Equal Protection Clause. *Id.* at 282.

104. *Id.* at 281-82.

105. 438 U.S. 265, 271 (1978) (Powell, J., announcing judgment of the Court).

106. See *Gutter v. Bollinger*, 539 U.S. 306, 328-30 (2003); Michelle Adams, *Stifling the Potential of Gutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 944-45 & n.41 (2008) (noting that Powell’s decision was “broadly influential” and citing cases). Four Justices believed the program violated Title VI, which prohibits race discrimination in educational programs receiving federal funding. Adams, *supra*, at 944 n.40. Four Justices concurred and dissented, and would have upheld the program under an equal protection challenge. *Id.* at 944 n.40. Thus, Powell’s vote became key to the outcome of the case. *Id.*

107. *Bakke*, 438 U.S. at 291, 311-12 (Powell, J., announcing judgment of the Court).

108. *Id.* at 318-19.

109. *Id.* at 320.

110. *Id.* at 296-97.

111. *Id.* at 307. In a later footnote, he acknowledges that disparate impact fits into this category because it “was based on legislative determinations, wholly absent here, that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination.” *Id.* at 308 n.44. According to Powell, unlike the situation in Title VII, there were no such findings to support U.C. Davis’ set aside program. See *id.*

of identified past discrimination and its discretionary authority to take appropriate remedial measures."¹¹² Thus, while the Court cannot extend antidiscrimination laws, Congress can.

The four Justices who concurred and dissented in the case would have applied intermediate scrutiny to programs intended to benefit groups who had been subject to discrimination.¹¹³ This group of Justices acknowledged the prevalence of discrimination in American society and posited that the effects of past societal discrimination were a sufficient reason to create race-conscious programs.¹¹⁴ While Justice Powell was concerned about those in the majority who would not be able to compete for the medical school seats, whom he characterized as "innocent victims" of discrimination,¹¹⁵ the dissenters understood that "innocent victims" expectations were framed by the "taint" of continuing discrimination on the part of employers and others. In the case of *Bakke*, it therefore was reasonable to assume that, "but for pervasive [race] discrimination," he would not have been admitted to U.C. Davis' medical school at all.¹¹⁶ Thus, those in the majority benefitted from continued race discrimination. Justice Marshall was explicit in his individual opinion: "It is unnecessary in twentieth century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact."¹¹⁷

Unlike the program in *Bakke*, the Court upheld race-conscious programs established by the federal government, although once again the Court failed to settle on a single reason. In *Fullilove v. Klutznick*, a 1980 case, the Court upheld a federal minority-business-enterprise program that set aside ten percent of federal funds granted under local public-works projects for such entities.¹¹⁸ Upholding the program, Chief Justice Burger, in an opinion joined by Justices White and Powell, noted a committee report that detailed how the present effects of past discrimination persisted in limiting the construction industry's economic opportunities for minority-owned businesses.¹¹⁹ While acknowledging that such

112. *Id.* at 302 n.41.

113. *Id.* at 359 (Brennan, White, Marshall & Blackmun, JJ., concurring in judgment in part and dissenting in part).

114. *Id.* at 362.

115. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978) (Powell, J., announcing judgment of the Court).

116. *Id.* The dissenters built on Powell's position that Congress can authorize race conscious programs, arguing that states as well, like California here, could "adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination." *Id.* at 366 (Brennan, White, Marshall & Blackmun, JJ., concurring in judgment in part and dissenting in part) (footnote omitted). This includes remedying the effects of past discrimination by "society at large." *Id.* at 369. Under their approach, proof that the specific beneficiary of the program experienced discrimination is unnecessary. *Id.* at 378.

117. *Id.* at 400 (Marshall, J., individual opinion).

118. 448 U.S. 448, 453, 492 (1980).

119. *Id.* at 465.

programs should be subject to “close examination,” Burger explained that the Court should still be deferential to Congress as a co-equal branch with explicit authority to enforce Section 5 of the Fourteenth Amendment.¹²⁰ He took his analysis one step further, extending the Court’s Fifteenth Amendment analysis to the Fourteenth Amendment and explaining that Congress had authority that “extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination.”¹²¹ While acknowledging that Congress had plenty of evidence of discrimination in the construction industry, Burger suggested such evidence was unnecessary: “Congress, of course, may legislate without compiling the kind of ‘record’ appropriate with respect to judicial or administrative proceedings.”¹²² Indeed, he stated that Congress had “broad remedial powers” to legislate in this area.¹²³ Justice Burger also provided a rare acknowledgment of white privilege. He explained that while some “innocent” businesses would be affected by the program, “it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.”¹²⁴

Other Justices concurred in the judgment. Justice Powell once again used strict scrutiny to assess the program, but determined that “eradicating the continuing effects of past discrimination” was a compelling interest that would meet that level of scrutiny.¹²⁵ Like Justice Burger, Justice Powell argued that Congress had authority to create such programs under the reconstruction amendments.¹²⁶ In a concurrence joined by Justices Brennan and Blackmun, Justice Marshall argued that the Court should apply intermediate scrutiny to federal programs such as this.¹²⁷ He agreed that remedying the “present effects of past racial discrimination” was a permissible purpose that would meet the intermediate scrutiny standard.¹²⁸ Justice Marshall also rejected the idea that Congress must make particularized findings to support this kind of legislation.¹²⁹

120. *Id.* at 472. He also couched this deference in Congress’ ability to provide for the general welfare. *See id.*

121. *Id.* at 477 (citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

122. *Id.* at 478.

123. *Id.* at 483.

124. *Id.* at 484-85.

125. *Id.* at 496 (Powell, J., concurring).

126. *Id.* at 500-02. This distinguished the situation from that of *Bakke*, where the state had no role in enforcing these amendments. *See id.* at 516.

127. *Id.* at 519 (Marshall, J., concurring in judgment).

128. *Fullilove v. Klutznick*, 448 U.S. 448, 520 (1980) (Marshall, J., concurring in judgment).

129. *Id.* at 520 n.4. The case drew three dissenting Justices—Stewart, Rehnquist, and Stevens. In two different opinions, both Stewart and Stevens believed Congress performed inadequate fact-finding to support the program. Justice Stewart, joined by Justice Rehnquist, argued that there was no evidence presented that Congress engaged in race discrimination in disbursing federal contracting money. *See id.* at 528 (Stewart, J., dissenting). Justice Stevens argued that Congress did not perform sufficient fact finding with respect to alternative remedies to its 10% plan. *Id.* at 552 (Stevens, J., dissenting).

In 1986, just prior to Justice Scalia's appointment, the Court issued another splintered decision on a race-conscious program—this time, under the Fourteenth Amendment's Equal Protection Clause. In *Wygant v. Jackson Board of Education*, a school district negotiated a contract with its teachers' union allowing a preference for retaining less-senior minority teachers when the district was faced with lay-offs.¹³⁰ In this case, the Court considered a new justification for a race-conscious program: "an attempt to remedy societal discrimination by providing 'role models' for minority schoolchildren."¹³¹ Using strict scrutiny, Justice Powell announced the judgment of the Court (with Justices Burger, Rehnquist, and O'Connor concurring in various parts) and argued that the "role model theory" was not a compelling state interest for strict scrutiny purposes.¹³² Instead, Justice Powell argued that early case law emphasized the need for showing "prior discrimination" in employment by local governmental entities before they could adopt race-conscious programs such as this school district's contract.¹³³ In doing so, he aligned the role model justification with remedying societal discrimination, arguing, "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness."¹³⁴ He also concluded that the program was not narrowly tailored because the layoffs affected particular teachers, disrupting their lives—a burden he found "too intrusive."¹³⁵

Justice O'Connor, joined by Justice White, concurred in the judgment, stating that "remedying past or present racial discrimination by a state actor" is a sufficient state interest to warrant an affirmative action program.¹³⁶ As O'Connor stated, "This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required."¹³⁷ Thus, for Justices O'Connor and White, in order to implement a race-conscious program, a public entity had to have some reason to believe that its own past or present discrimination created the imbalance it sought to remedy.¹³⁸ Neither

130. 476 U.S. 267, 270 (1986) (Powell, J., announcing judgment of the Court).

131. *Id.* at 272.

132. *Id.* at 275-76.

133. *Id.* at 275.

134. *Id.* at 276. Justice Powell explained that there are many possible explanations for the disproportionate number of students of color versus faculty of color in the school district. *Id.* Put simply, he was unwilling to assume the school district discriminated based on the lack of proportionality between the black student population and black teacher population at the school. *See id.* Instead, a school district must have "a strong basis in evidence" to justify remedial action. *Id.* at 277. The employees challenging such a program still have the burden of demonstrating that it is unconstitutional. *Id.* at 277-78.

135. *Id.* at 283.

136. *Id.* at 286 (O'Connor, J., concurring in part and concurring in judgment).

137. *Id.*

138. This is consistent with Justice O'Connor's position in race-conscious program cases under Title VII. *See Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 647-49 (1987) (O'Connor, J., concurring in judgment). As Justice O'Connor stated, "[T]he employer must have had a firm basis for believing that remedial action was required." *Id.* at 649.

societal discrimination nor providing role models, however, were sufficient state interests to justify this program.¹³⁹ Once again, four Justices disagreed.¹⁴⁰

In 1987, in *United States v. Paradise*, the Court made another rare acknowledgment of how whites have benefited from past racial discrimination.¹⁴¹ In *Paradise*, a trial court found that Alabama had discriminated in hiring and promoting state troopers.¹⁴² After much recalcitrance by Alabama in complying with earlier court orders, the lower court ordered a race-conscious remedy, which the U.S. Supreme Court upheld.¹⁴³ Once again, the Court could not agree on which level of scrutiny to apply to race-conscious programs, but here it did not need to because—as Justice Brennan reasoned in announcing the judgment—this program met strict scrutiny.¹⁴⁴ Writing for a four-Justice plurality, Justice Brennan explained, “‘It cannot be gainsaid that white troopers promoted since 1972 were the specific beneficiaries of an official policy which systematically excluded all blacks.’”¹⁴⁵ Once again, four Justices dissented.¹⁴⁶

In 1990, the Supreme Court finally appeared to settle one issue concerning the level of scrutiny applicable to federal race-conscious programs. In *Metro Broadcasting Inc. v. FCC*, the Court applied intermediate scrutiny to uphold the FCC’s policy of giving certain preferences to minority broadcasters when granting FCC licenses.¹⁴⁷ Thus, the Court applied a different standard to race-conscious programs implemented by Congress than it did to those adopted by state and local governments.¹⁴⁸ The Court held that encouraging a diversity of broadcast viewpoints met the important governmental interest standard used for intermediate scrutiny.¹⁴⁹ In addition, the Court deferred to Congress and the FCC, stating, “[W]e are required to give ‘great weight to the decisions of

139. *Wygant*, 476 U.S. at 288 (O’Connor, J., concurring in part and concurring in judgment).

140. Justice Marshall, joined by Justices Brennan and Blackmun, believed this program was narrowly tailored. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 301-10 (1986) (Marshall, J., dissenting). Justice Stevens used a different approach. He argued that “we should first ask whether the Board’s action advances the public interest in educating children for the future. If so, I believe we should consider whether that public interest, and the manner in which it is pursued, justifies any adverse effects on the disadvantaged group.” *Id.* at 313 (Stevens, J., dissenting).

141. 480 U.S. 149 (1987).

142. *Id.*

143. *Id.* at 149-50.

144. *Id.* at 166-67. Justices Powell and Stevens wrote separate concurrences. Of particular interest is Justice Stevens’s concurrence, in which he argued that judges have broad equitable authority to order remedies for proven Equal Protection Clause violations. *Id.* at 190 (Stevens, J., concurring). Thus, he argued that strict scrutiny should not apply to this situation; instead, a court’s remedy should be judged by its effectiveness. *Id.* at 192.

145. *Id.* at 170 (Brennan, J., plurality opinion) (quoting *Paradise v. Prescott*, 767 F.2d 1514, 1533 n.16 (11th Cir. 1985)).

146. White and O’Connor wrote separate dissents. Justices Rehnquist and Scalia joined in Justice O’Connor’s dissent. *Id.* at 196 (O’Connor, J., dissenting). Justice O’Connor argued that the lower court had not considered available alternatives to the race-conscious program it ordered. *Id.* at 201.

147. 497 U.S. 547, 564-65 (1990).

148. *Id.* at 565.

149. *Id.* at 567-68.

Congress and the experience of the Commission.”¹⁵⁰ Indeed, Congress is different: “The ‘special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue.’”¹⁵¹ As Justice Stevens noted in a separate concurrence, the decision in this case focused not on past wrongs, but instead on “future benefit.”¹⁵²

Justice O'Connor, joined by Justices Rehnquist, Scalia, and Kennedy, dissented. She argued that strict scrutiny should apply here.¹⁵³ Using that standard, the government's interest in increased broadcast viewpoint diversity was not a compelling state interest.¹⁵⁴ She explained that it was “too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.”¹⁵⁵

Justice Kennedy, joined by Justice Scalia, wrote a separate dissent. He was concerned about the harm such programs exact on those who do not benefit from them.¹⁵⁶ Unlike the Justices who acknowledged the benefits white Americans gained from black Americans' exclusion from entire industries, Kennedy posited one possible explanation for asking these individuals to accept this harm:

One is that the group disadvantaged by the preference should feel no stigma at all, because racial preferences address not the evil of intentional discrimination but the continuing unconscious use of stereotypes that disadvantage minority groups. But this is not a proposition that the many citizens, who to their knowledge “have never discriminated against anyone on the basis of race,” will find easy to accept.¹⁵⁷

Thus, while Justice Kennedy acknowledged the possibility of unconscious racism and stereotypes operating and justifying race-conscious government programs, he did not believe those few members of the majority who are disadvantaged by race-conscious programs would accept that explanation.

In the majority opinion, Justice Brennan used the words of the dissenting Justices from other cases to undermine their positions in this case:

Justice O'Connor, joined by two other Members of this Court, noted that “Congress may identify and redress the effects of society-wide discrimination,” and that Congress “need not make specific findings of discrimination to engage in race-conscious relief.” Echoing *Fullilove*'s emphasis on Congress as a National Legislature that stands above factional politics, Justice Scalia argued that as a matter of “social reality and governmental theory,” the Federal Government is unlikely to be captured by minority racial or ethnic groups and used as an instrument of

150. *Id.* at 569 (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)).

151. *Id.* at 572 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 502-03 (1980)).

152. *Id.* at 601 (Stevens, J., concurring).

153. *Id.* at 602 (O'Connor, J., dissenting).

154. *Id.* at 612.

155. *Id.*

156. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting).

157. *Id.* at 636-37 (quoting *City of Richmond v. Croson*, 488 U.S. 469, 516 (1989)).

discrimination. Justice Scalia explained that “[t]he struggle for racial justice has historically been a struggle by the national society against oppression in the individual States,” because of the “heightened danger of oppression from political factions in small, rather than large, political units.”¹⁵⁸

Justice Brennan relied upon the dissenters’ prior statements to show that they too had acknowledged both the prevalence of discrimination in American society and Congress’s ability to remedy such discrimination.

These cases reveal several themes about how the Court perceived the continuing effects of discrimination in American society. First, during the 1980s and 1990, a majority upheld the federal government’s race-conscious congressional programs that were designed to remedy the continuing effects of past discrimination. The Court acknowledged that persons of color were experiencing discrimination and that Congress possessed the power to address such problems. In addition, the occasional Justice even admitted that whites had benefited from this system, justifying some loss of opportunities by those in the white majority. *Metro Broadcasting* in 1990 stands out as the last case that gave deference to Congress. Even before that, in 1987, a trend away from this deference and an emphasis on current intentional discrimination began to emerge.

III. THE SHIFT

The shift in the Court’s antidiscrimination jurisprudence began in 1987 and proceeded in earnest in 1989. The first harbinger of things to come was *McCleskey v. Kemp*, a case challenging Georgia’s death penalty scheme as unconstitutional under the Fourteenth Amendment because it discriminated based on the races of the perpetrator and the victim.¹⁵⁹ In 1989, a trilogy of cases further eviscerated the Court’s antidiscrimination jurisprudence in three areas: the disparate impact theory under Title VII; the Fourteenth Amendment’s Equal Protection Clause; and Section 1981, a statute that prohibits discrimination based on race in making contracts.¹⁶⁰ As explained above, *Metro Broadcasting* later allowed Congress to continue to legislate with respect to federal race-conscious programs. But that permission only lasted for five years—until the Court’s decision in *Adarand Constructors, Inc. v. Peña*.¹⁶¹ The Court did not stop there, however; in a series of cases leading into the twenty-first century, the Court continued to undermine its earlier presumptions of discrimination, simultaneously making it more difficult for Congress to address discriminatory

158. *Id.* at 565-66 (majority opinion) (quoting *Croson*, 488 U.S. at 489-90, 522-523 (internal citations omitted)).

159. 481 U.S. 279, 286 (1987). I am not the first to argue that *McCleskey* is a pivotal case. Other commentators have as well. See, e.g., Selmi, *supra* note 2, at 321.

160. The three cases are: *Wards Cove Packing v. Atonio*, 490 U.S. 642 (1989) (affecting Title VII disparate impact); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (affecting Equal Protection Clause law); and *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (affecting Section 1981).

161. 515 U.S. 200 (1995).

conduct in various industries, states, and the federal government. This section charts this shift, beginning with *McCleskey*.

McCleskey may not have been much of a shift from the Court's earlier jurisprudence concerning discrimination by public actors. Indeed, the Court did not accept disparate impact analysis in 1979 in *Washington v. Davis*, a case involving the Fifth Amendment's equal protection component.¹⁶² *McCleskey*, however, involved a state and a statistical showing on an issue of paramount importance—imposition of the death penalty. In *McCleskey*, the Court refused to invalidate Georgia's capital sentencing scheme under the Fourteenth Amendment as applied to Warren McCleskey, despite a compelling statistical study suggesting that the defendants' and victims' races had an impact on who received a death sentence.¹⁶³ In cases involving a black defendant and a white victim, the defendant received the death penalty 22% of the time.¹⁶⁴ In cases involving a white defendant and a white victim, the defendant received the death penalty 8% of the time.¹⁶⁵ In cases involving a black defendant and a black victim, the defendant received the death penalty 1% of the time.¹⁶⁶ Finally, in cases involving a white defendant and a black victim, the defendant received the death penalty 3% percent of the time.¹⁶⁷ All in all, taking into account 39 different variables that might account for these differences, defendants charged with killing white victims were 4.3 times more likely to receive the death penalty than those who killed blacks.¹⁶⁸ McCleskey was a black defendant who had killed a white victim,¹⁶⁹ and therefore, belonged to the group with the highest likelihood of receiving the death penalty. He argued that the study showed that his and his victim's races likely played an impermissible role in his sentence.¹⁷⁰

Rather than evaluating what the statistics suggested about Georgia's death penalty scheme, the Court engaged in an individualized analysis—it looked at whether McCleskey could show that race played a role in his individual sentence. It criticized McCleskey's argument, stating that his "claim of discrimination extends to every actor in the Georgia capital sentencing process."¹⁷¹ Instead of casting such a wide net, McCleskey needed to "prove that the decisionmakers in *his* case acted with discriminatory purpose."¹⁷² While the Court conceded that a litigant can raise a presumption of discrimination from statistics in jury selection cases, the Court distinguished such cases, arguing that they involved fewer

162. 462 U.S. 229 (1976).

163. *McCleskey*, 481 U.S. at 286-87.

164. *Id.* at 286.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 287.

169. *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987).

170. *Id.* at 286.

171. *Id.* at 292.

172. *Id.*

entities and variables than those in death penalty decisions.¹⁷³ The Court held that McCleskey's statistical showing did not raise an inference of discrimination in his case.¹⁷⁴ Instead, McCleskey needed to identify the individual bad actor in his case—the biased prosecutor or juror(s)—and show that that person or group of persons intended to discriminate.¹⁷⁵ This shift to the individual bad actor, and the concomitant notion that racism is not a common, society-wide phenomenon, is reflected throughout many antidiscrimination cases that followed *McCleskey*.¹⁷⁶

Some of the Court's reasoning mirrored its earlier rejection of disparate impact analysis as applied to the federal government in *Washington v. Davis*. The Court seemed concerned about its decision's implications. In its Eighth Amendment analysis in *McCleskey*, the Court explained that McCleskey's arguments could "throw ... into serious question the principles that underlie our entire criminal justice system."¹⁷⁷ The majority argued that accepting McCleskey's race bias claim would lead to similar claims for other types of penalties.¹⁷⁸ The parade of potential horrors continued: challenges by other minority groups and women as well as challenges to the race or sex of the prosecutor, just to name a few.¹⁷⁹

Justice Brennan, writing for the four dissenting Justices, argued that a defendant need only show that there was a "significant risk" that race discrimination played a part in his sentencing to maintain an Eighth Amendment claim.¹⁸⁰ This group of dissenters proceeded to describe Georgia's checkered

173. *Id.* at 294-95. The Court likewise distinguished Title VII cases that raise an inference of discrimination from statistics on the same ground. *See id.*

174. *Id.* at 297.

175. *Id.* at 292.

176. The language the Court used in reaching its conclusion is telling. Far from allowing statistics to raise an inference of discrimination, the majority speaks in terms of proving "purposeful discrimination," using "exceptionally clear proof," and that McCleskey needed to show that the Georgia legislature enacted and/or maintained this scheme "because of an anticipated racially discriminatory effect." *Id.* at 292, 297, 298 (emphasis in original). The Court concluded, "[w]here the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious." *Id.* at 313. Further, the Court was concerned that prosecutors would have difficulty refuting statistical cases such as this. *Id.* at 296. The Court stated that you cannot bring jurors back to testify about why they decided a case in a particular manner, and prosecutorial discretion dictates that prosecutors have leeway in determining against whom to seek the death penalty. *See id.* Interestingly, the statistics on prosecutors were compelling as well. The study showed that prosecutors sought the death penalty in: (1) "70% of the cases involving black defendants and white victims"; (2) "32% of cases involving white defendants and white victims"; (3) "15% of the cases involving black defendants and black victims"; and (4) "19% of cases involving white defendants and black victims." *Id.* at 287. It held that McCleskey's evidence did not even warrant a rebuttal by the prosecution in his case. *Id.* at 296-97. McCleskey was entitled to no presumption of discrimination as a result of his strong statistical showing and no explanation by the prosecutor as to why the death penalty was sought in his case.

177. *Id.* at 314-15.

178. *Id.* at 315.

179. *McCleskey v. Kemp*, 481 U.S. 279, 316-17 (1987).

180. *See id.* at 324 (Brennan, J., dissenting).

history on race relations, which included dual criminal-law systems, and placed it in a current context:

This historical review of Georgia criminal law is not intended as a bill of indictment calling the State to account for past transgressions. Citation of past practices does not justify the automatic condemnation of current ones. But it would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey's evidence. "[A]mericans share a historical experience that has resulted in individuals within the culture ubiquitously attaching a significance to race that is irrational and often outside their awareness."¹⁸¹

Justice Brennan concluded that Georgia's sentencing scheme provided opportunities for race to play a role, "however subtle and unconscious," in capital sentencing decisions.¹⁸² According to Brennan, McCleskey's statistical evidence was "consistent with the lessons of social experience."¹⁸³

Justice Blackmun, also dissenting, took on the majority's Fourteenth Amendment analysis, arguing for application of the standards used for challenging racially discriminatory peremptory challenges of jurors.¹⁸⁴ Under this standard, a defendant can raise a Fourteenth Amendment violation by showing three things: (1) that he belongs to a group that has been treated differently; (2) that there was a substantial degree of different treatment; and (3) that the discriminatory procedure presents the possibility of abuse or is not racially neutral.¹⁸⁵ Here, the evidence gave rise to an inference of discrimination.¹⁸⁶ Blackmun concluded that "[j]udicial scrutiny is particularly appropriate in McCleskey's case because '[m]ore subtle, less consciously held racial attitudes could also influence' the decisions in the Georgia capital sentencing system."¹⁸⁷ Thus, the four dissenters acknowledged the role of

181. *Id.* at 332 (quoting Charles Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 327 (1987)).

182. *Id.* at 333-34.

183. *Id.* at 334.

184. *Id.* at 352-53 (Blackmun, J., dissenting).

185. *Id.*

186. *Id.* at 359.

187. *Id.* at 364 (quoting *Turner v. Murray*, 476 U.S. 28, 35 (1986)). The outcome of *McCleskey* is even more curious given the Court's decision one year earlier in *Turner*. In *Turner*, the Court held that a defendant who is involved in an interracial capital crime is permitted to inform prospective jurors of this and ask them about issues of racial bias. 476 U.S. at 37. In the various opinions handed down by the Justices in that case, several openly commented about the influence of racial bias in capital sentencing. See, e.g., *id.* at 35 ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected."); *id.* at 39 (Brennan, J., concurring in part and dissenting in part) ("The reality of race relations in this country is such that we simply may not presume impartiality, and the risk of bias runs especially high when members of a community serving on a jury are to be confronted with disturbing evidence of criminal conduct that is often terrifying and abhorrent."); *id.* at 45 (Marshall, J., with Brennan, concurring in judgment in part and dissenting in part) ("[I]t is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence." (quoting *id.* at 36 n.8)). Why such a presumption did not work for *McCleskey*, given the statistical showing, is not contained in that case's majority opinion. See

unconscious racism in Georgia's capital sentencing scheme. The majority did not.

Two years later, in 1989, the Court decided several major antidiscrimination cases. The Court began the year by undercutting the ability of state and local governments to create race-conscious remedial programs aimed at the present effects of past discrimination. In *City of Richmond v. J.A. Croson Co.*, the Court applied strict scrutiny to a 30% minority-business set-aside program for public construction projects financed by the City of Richmond, Virginia ("City").¹⁸⁸ Writing for the majority, Justice O'Connor applied strict scrutiny and held that the program was unconstitutional.¹⁸⁹ She asserted that a "generalized assertion [of] past discrimination in an entire industry" was insufficient to warrant the City's race-conscious program.¹⁹⁰ Here, according to the Court, "[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors."¹⁹¹ While Justice O'Connor recognized "the sorry history of both private and public discrimination in this country,"¹⁹² she refused to transmute that history and evidence supplied by the City about discrimination in the local construction industry into an inference of discrimination sufficient to warrant a race-conscious remedy.¹⁹³ Instead, Justice O'Connor took a piecemeal approach to the City's evidence, arguing that each fact the City used to justify its program was insufficient to support it.¹⁹⁴ In failing to recognize that, taken together, this evidence might well have justified the City's program, Justice O'Connor focused on the trees while ignoring the forest.

In a portion of Justice O'Connor's opinion joined by Justices Rehnquist, White, and Kennedy, she suggested what cities such as Richmond need to do to justify such programs:

McCleskey, 481 U.S. at 309 & n.30 (two citations of *Turner* by majority with no attempt to explain different outcome). This suggests that the Court was fully aware of the potential for race bias to play a role in criminal cases. One explanation for the seeming shift is a simple change in personnel. In *Turner*, Justice Burger was still a member of the Court and agreed with the majority position in that case. By 1987, Chief Justice Burger had stepped down, with Chief Justice Rehnquist filling his shoes, and Justice Scalia was appointed to fill Justice Rehnquist's former slot. Still, Justices O'Connor and White, who were in the majority in *McCleskey*, agreed with the potential for race bias to play a part in the *Turner* fact pattern.

188. 488 U.S. 469, 498-99 (1989).

189. *Id.* at 511.

190. *Id.* at 498.

191. *Id.* at 480.

192. *Id.* at 499.

193. *Id.*

194. *Id.* at 503-04. In his dissent, Justice Marshall pointed out this methodology, explaining that "[t]he majority also takes the disingenuous approach of disaggregating Richmond's local evidence, attacking it piecemeal, and thereby concluding that no *single* piece of evidence adduced by the city, 'standing alone,' suffices to prove past discrimination. But items of evidence do not, of course, 'stan[d] alone' or exist in alien juxtaposition; they necessarily work together, reinforcing or contradicting each other." *Id.* at 541 (Marshall, J., dissenting) (internal citations omitted) (emphasis in original). Justice O'Connor also held that the program was not narrowly tailored. *Id.* at 507-08 (majority opinion). Specifically, the City was remiss in not considering race-neutral alternatives and there appeared to be little justification for the 30% set-aside that the City used. *Id.*

If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.¹⁹⁵

The first category of evidence amounts to the smoking gun—direct evidence of nonminority contractors excluding minority contractors. While the second category seems to suggest that evidence of a disparate impact might suffice, it has chicken-and-egg problems. Why would minorities enter into an industry when the majority will not deal with them in the first place? An analysis failing to give weight to the industry's lack of opportunity for racial minorities (which Richmond's evidence from Congress provided¹⁹⁶) is unlikely to remedy systematic exclusion from an entire industry. The Court backed away from inferring discrimination, making it difficult for states and their political subdivisions to remedy perceived inequities.¹⁹⁷

The dissenters in this case pointed out the anomalies and implications of the decision. Justice Blackmun dissented, observing:

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation.¹⁹⁸

Justice Marshall argued once again that the Court should apply intermediate scrutiny to race-conscious programs designed to help members of minority groups.¹⁹⁹ To him, "a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies

195. *Id.* at 509.

196. A majority of the Court held that Richmond could not piggyback on congressional fact finding as to the history and prevalence of discrimination against minority groups in the construction industry. As the Court explained, "While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race conscious relief." *Id.* at 504.

197. *Id.* at 540-41 (Marshall, J., dissenting). Unlike the University of California at Davis Medical School in *Bakke*, Richmond had evidence suggesting discrimination in the local construction industry as well. Included in the City's proffered evidence were the following facts: (1) only "0.67% of public ... expenditures over the previous five years had gone to minority-owned prime contractors" even though Richmond was a very racially diverse city; (2) area trade organizations had "virtually no minority members," and (3) testimony by public officials about the links between race discrimination and the lack of contracts with minority owned businesses. *Id.*

198. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 561 (1989) (Blackmun, J., dissenting).

199. *Id.* at 554 (Marshall, J., dissenting).

need no longer preoccupy themselves with rectifying racial injustice.”²⁰⁰ Justice Marshall asserted that remedying past discrimination and making certain that a public entity does not perpetuate it are important interests that the Richmond program substantially promoted.²⁰¹

The second 1989 case was *Wards Cove Packing Co. v. Atonio*.²⁰² In *Wards Cove*, the Supreme Court reformulated its analysis in Title VII disparate impact cases, making it easier for employers to win such cases while undermining the presumption of discrimination the showing of impact suggests. In this case, the Court made several significant changes to disparate impact jurisprudence. First, it did not permit the plaintiff to compare the racial composition of two different work areas—salmon cannery workers and non-cannery workers—arguing that essentially this would be like comparing apples to oranges.²⁰³ Thus, the plaintiffs did not even raise a *prima facie* case of disparate impact.²⁰⁴ Second, the Court required the plaintiff to identify the specific employment practice that had caused the impact.²⁰⁵ Third, the Court no longer shifted the burden of proof to the employer once an employee raised a *prima facie* case of disparate impact discrimination.²⁰⁶ Instead, the court imposed on the employer a lesser burden of production.²⁰⁷ Finally, the Court shifted the employer’s defensive showing from the *Griggs v. Duke Power Co.* standard requiring a practice to be job related and consistent with business necessity to a lighter standard requiring only a “business justification.”²⁰⁸

Wards Cove involved the Alaska salmon canning industry, which operates only during the summer months.²⁰⁹ There were two types of jobs at the canneries.²¹⁰ Cannery workers, who performed unskilled labor, were predominantly non-white, including Filipinos and Alaska natives.²¹¹ The canneries hired the Filipinos through a union pursuant to a hiring hall agreement.²¹² The Alaska Natives lived in villages near the remote cannery locations.²¹³ Non-cannery workers (considered “skilled” jobs) were predominantly white.²¹⁴ The non-cannery jobs generally paid better, and the non-cannery workers lived in separate dorms and ate in mess halls separate from the cannery workers’ mess halls.²¹⁵ The cannery employees alleged that a variety of

200. *Id.* at 552.

201. *Id.* at 548.

202. 490 U.S. 642 (1989).

203. *Id.* at 651.

204. *Id.*

205. *Id.* at 656-57.

206. *Id.* at 659.

207. *Id.*

208. *Id.*

209. *Id.* at 646.

210. *Id.* at 647.

211. *Id.*

212. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 647 (1989).

213. *Id.*

214. *Id.*

215. *Id.*

employer practices led to this segregated employee population.²¹⁶ Also, they complained about the employer's racially segregated living facilities.²¹⁷

Rather than permitting the plaintiffs to compare the cannery worker population to the non-cannery worker population, the Court concluded that the "proper" comparison was between the racial make-up of the jobs at issue and the racial make-up of the qualified population in the relevant labor market.²¹⁸ Where labor market statistics were unavailable, the Court stated that other statistics, such as measures indicating the racial composition of "otherwise-qualified applicants for at-issue jobs," might be appropriate.²¹⁹ Plaintiffs could use general population statistics if they "reflect[ed] the pool of qualified job applicants."²²⁰ The plaintiffs' comparison of the population of cannery workers to the population of non-cannery workers was inappropriate for several reasons.²²¹ First, "the cannery work force in no way reflected 'the pool of *qualified* job applicants' or the '*qualified* population in the labor force.'"²²² Non-cannery jobs required a certain amount of skill (they included accountants, doctors, boat captains, and engineers),²²³ and there was no way to know whether cannery workers possessed those skills. Otherwise, any employer who had a racial imbalance in any segment of its workforce could be haled into court to justify its hiring practices in another area of its workforce on the basis of business necessity.²²⁴ The Court believed this would result in employers adopting quotas, which Congress did not intend in enacting Title VII.²²⁵

The Court in *Wards Cove* required plaintiffs to "isolat[e] and identify" the specific practice that caused the disparate impact.²²⁶ This "isolat[e] and identify" language had been rejected by a majority of the Court a year earlier in *Watson v. Fort Worth Bank & Trust*.²²⁷ In *Watson*, a majority of the Court held that disparate impact analysis could be applied to subjective employment practices.²²⁸ However, only four Justices agreed that the employee must "isolate[e] and identify" the specific employment practice causing the impact.²²⁹ The difference in the outcomes of *Watson* and *Wards Cove* was Justice Kennedy. Justice

216. *Id.* at 647-48. These practices included: (1) nepotism; (2) a rehiring preference; (3) lack of objective hiring criteria; (4) separate hiring channels; and (5) a practice of not promoting from within. *Id.* at 647. These led to a disparate impact on non-whites in the hiring of non-cannery workers. *Id.*

217. *Id.* at 648.

218. *Id.* at 650.

219. *Id.* at 651 (internal quotations omitted).

220. *Id.* at 651 n.6.

221. *Id.* at 651.

222. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 651 (1989) (emphasis in original).

223. *Id.* at 651-52.

224. *Id.* at 652.

225. *Id.*

226. *Id.* at 656.

227. 487 U.S. 977, 994 (1988).

228. *Id.* at 990.

229. *Id.* at 994, 982.

Kennedy did not take part in the decision in *Watson*,²³⁰ but, he provided the fifth vote in *Wards Cove*, imposing a more employer-friendly standard.²³¹ In *Wards Cove*, the plaintiffs identified several different “objective” practices—nepotism, separate hiring channels, and rehire preferences—as well as subjective criteria.²³² According to the Court, they needed to specify and show the impact of each such practice.²³³

The *Wards Cove* Court did not stop there. Rather than maintaining the employer’s burden as one of proof, the Court lightened it to merely a burden of production, while at the same time abandoning the business necessity and job relatedness standard.²³⁴ The Court wrote that the “dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.”²³⁵ While the employer does not meet this burden with “insubstantial justifications,” “there is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet.”²³⁶ Thus, the employer only needed to produce evidence of a business justification for its employment practice, rather than showing that the practice was necessary.

While the employee could argue that the employer should have adopted alternative practices that would have had less adverse impact, the Court raised the employee’s burden on this showing as well. For an employee to meet this burden, the alternative practice “must be equally effective as [the employer’s] chosen” method in “achieving [the employer’s] legitimate employment goals.”²³⁷ This effectiveness measurement included considering the cost and other burdens associated with the alternative practice.²³⁸ The Court gave deference to employers: “[T]he judiciary should proceed with care before mandating that an employer must adopt a plaintiff’s alternative selection or hiring practice in response to a Title VII suit.”²³⁹ Through their opinion in *Wards Cove*, a majority of the Court shifted to a much more employer-friendly standard that appeared less skeptical of employer motivations and more deferential to employer justifications, even in the face of employer policies that created a disparate impact.

The dissenters in this case called the majority on its shift. For example, in his dissent Justice Blackmun explained: “Sadly, this comes as no surprise. One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or

230. *Id.* at 981.

231. *Wards Cove*, 490 U.S. at 644.

232. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 647 (1989).

233. *Id.* at 656.

234. *Id.* at 659-60.

235. *Id.* at 659.

236. *Id.*

237. *Id.* at 661.

238. *Id.*

239. *Id.*

even remembers that it ever was.”²⁴⁰ As Justice Blackmun argued, the “salmon industry as described by this record takes us back to a kind of overt and institutionalized discrimination we have not dealt with in years: a total residential and work environment organized on principles of racial stratification and segregation which ... resembles a plantation economy.”²⁴¹ Likewise, Justice Stevens pointed out in his dissent how the majority’s standard departed from *Griggs*²⁴² and was problematic in its comparison pool analysis.²⁴³ As Justice Stevens explained, the cannery workers may well have been an apt comparison pool to non-cannery workers, especially in the nonskilled jobs, because all these workers had one highly relevant characteristic in common: All of them were willing to take seasonal work in remote parts of Alaska.²⁴⁴ Justice Stevens ended his dissent by noting that the reasons for the majority’s shift were “a mystery” to him.²⁴⁵ As he explained, “I cannot join this latest sojourn into judicial activism.”²⁴⁶ The Court’s position in *Wards Cove* apparently was inconsistent with the beliefs of the American people. Congress legislatively overruled *Wards Cove* in the Civil Rights Act of 1991, which reinstated the earlier *Griggs* standard.²⁴⁷

The final 1989 case that undermined the Court’s anti-discrimination jurisprudence is *Patterson v. McLean Credit Union*, a case brought under Section 1981.²⁴⁸ Section 1981 makes it illegal to discriminate based on race in contracts.²⁴⁹ In *Patterson*, the Court made this statute far less effective by holding that it does not apply to racial harassment and that it is limited to the making of contracts.²⁵⁰ The plaintiff had alleged that she was harassed, not

240. *Id.* at 662 (Blackmun, J., dissenting).

241. *Id.*

242. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 671-72 (1989) (Stevens, J., dissenting).

243. *Id.* at 676.

244. *Id.*

245. *Id.* at 679.

246. *Id.* at 663.

247. The Civil Rights Act of 1991 states in pertinent part: “An unlawful employment practice based on disparate impact is established under this title only if— (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity....” Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k)(1)(A)). The statute defined “demonstrates” as “meets the burdens of production and persuasion.” *Id.* § 104, 105 Stat. at 1074 (codified at 42 U.S.C. § 2000e(m)). The new Act also replaced “pretext” in the plaintiff’s rebuttal case with proof of “alternative employment practice” as developed in cases prior to *Wards Cove*. *Id.* § 105, 105 Stat. at 1074 (codified at 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C)).

248. 491 U.S. 164, 168 (1989).

249. 42 U.S.C. § 1981(a) (2006).

250. *Patterson*, 491 U.S. at 171, 177, 188. While it upheld an earlier decision that made Section 1981 applicable to private contracts, the Court reconsidered the precedent on this point, ultimately invoking stare decisis to uphold *Runyon v. McCrary*. *Id.* at 172-74. See also *Runyon v. McCrary*, 427 U.S. 160 (1976).

promoted, and finally was terminated based on her race.²⁵¹ While the majority paid much lip service to the idea that American society views race discrimination as a “profound wrong,” it was unwilling to extend the statute to racial harassment.²⁵²

Justice Brennan, concurring in part and dissenting in part, found the majority’s reading of Section 1981 crabbed: “When it comes to deciding whether a civil rights statute should be construed to further our Nation’s commitment to the eradication of racial discrimination, the Court adopts a formalistic method of interpretation antithetical to Congress’ vision of a society in which contractual opportunities are equal.”²⁵³ Brennan argued that Section 1981 “is the product of a national consensus that racial discrimination is incompatible with our best conception of our communal life, and with each individual’s rightful expectation that her full participation in the community will not be contingent upon her race.”²⁵⁴ Like the Court’s reformulation of disparate impact, Congress legislatively overruled the Court’s interpretation of Section 1981 in the Civil Rights Act of 1991.²⁵⁵

Four years later, the Court undermined the presumption of discrimination it had set out some 20 years earlier in *McDonnell Douglas v. Green*. In *St. Mary’s Honor Center v. Hicks*,²⁵⁶ the Court held that even if the fact finder did not believe the employer’s legitimate discriminatory reason, it did not have to find for the plaintiff, even if the plaintiff made a prima facie case of discrimination.²⁵⁷ The plaintiff was an African American corrections officer who had a good work record until two new supervisors were hired above him.²⁵⁸ He then became the subject of repeated and increasingly severe disciplinary actions.²⁵⁹ He was suspended for five days for his subordinates’ rule violations.²⁶⁰ After receiving a

251. *Patterson*, 491 U.S. at 169.

252. *Id.* at 188.

253. *Id.* at 189 (Brennan, J., dissenting). In addition, Justice Brennan questioned the Court’s reconsideration of *Runyon*, explaining that the case was clearly “consonant with our society’s deep commitment to the eradication of discrimination based on a person’s race or the color of her skin.” *Id.* at 191.

254. *Id.*

255. Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2-3, 105 Stat. 1071, 1071. In particular, Congress made clear that “make and enforce contracts” includes “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” *Id.* § 101(2), 105 Stat. at 1072 (codified at 42 U.S.C. § 1981(b)). In addition, Congress made clear that it applied to “impairment by nongovernmental discrimination and impairment under color of State law.” *Id.* (codified at 42 U.S.C. § 1981(c)). Thus, the questions raised by the majority in *Wards Cove* about the continued efficacy of *Runyon v. McCrary* were laid to rest by Congress. See generally *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

256. 509 U.S. 502 (1993). Prior to this case, it was commonly thought that the presumption of discrimination was mandatory, i.e., if a jury found pretext, the defendant lost. See Krieger, *supra* note 55, at 1224.

257. *Hicks*, 509 U.S. at 511.

258. *Id.* at 504-05.

259. *Id.* at 505.

260. *Id.*

letter of reprimand, he was finally demoted from shift commander to correctional officer.²⁶¹ Eventually, he was discharged for threatening his supervisor during an argument.²⁶² The plaintiff failed to prevail even though the trial court did not believe the employer's reasons for terminating the plaintiff.²⁶³ According to the district court, the plaintiff did not prove that his termination resulted from discrimination, but instead the court reasoned that it was merely a personality conflict.²⁶⁴ Yet, the employer never alleged a personality conflict as an explanation for its decision.²⁶⁵ Despite this lack of explanation, the Supreme Court ultimately held that the trial court was free to find for the defendant, even though it did not believe its reason for firing the plaintiff.²⁶⁶

Joined by three other Justices, Justice Souter dissented. To him, a *prima facie* case was a proven case; it meant that the plaintiff had shown, by a preponderance of the evidence, that discrimination more likely than not motivated the employer's actions.²⁶⁷ Based on this evidence, Hicks had eliminated the two most likely explanations for his termination, i.e., that he was unqualified for the job or that the job was no longer available.²⁶⁸ While Justice Souter acknowledged that the employer may proffer an explanation, he stated that "it would be equally unfair and utterly impractical to saddle the victims of discrimination with the burden of either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision."²⁶⁹ Thus, the majority's approach to the presumption raised by the *prima facie* case did not operate as earlier cases suggested.²⁷⁰ Even if the fact finder did not believe the employer's explanation for its actions, the fact finder was still free to find for the employer.²⁷¹

Seven years later, in *Reeves v. Sanderson Plumbing Products, Inc.*, the Court seemed to grant plaintiffs a reprieve from the *Hicks* holding.²⁷² Upon closer examination, however, *Reeves* was not as helpful to plaintiffs as it first appeared. In *Reeves*, the Court held that it meant what it said in *Hicks*: A jury does not have to rule in a plaintiff's favor when the employer's legitimate nondiscriminatory reason is not credible, but it can rule for the plaintiff if it

261. *Id.*

262. *Id.* at 504-05.

263. *Id.* at 508.

264. *Id.*

265. *See id.* at 523.

266. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

267. *Id.* at 527 (Souter, J., dissenting).

268. *Id.*

269. *Id.* at 528.

270. *But see Selmi, supra* note 2, at 333-34 (arguing that *Hicks* is not in fact an aberration, but instead "is ultimately consistent with the Court's long-standing refusal to expand the definition of discrimination and the Court's inability to recognize discrimination absent some clear evidence of exclusion."). Others have argued that *Hicks* did present a shift in the Court's inferential case law. *See, e.g., Maatman, supra* note 10, at 37-42.

271. *Hicks*, 509 U.S. at 511.

272. 530 U.S. 133 (2000).

believes that discrimination more likely than not motivated the employer.²⁷³ In doing so, the Court seemingly rejected the “pretext plus” line of cases, in which some lower courts required plaintiffs to submit evidence that the legitimate nondiscriminatory reason was false (“pretext”), “plus” other evidence of discrimination.²⁷⁴

While this case appeared to lighten the burden on plaintiffs, the Supreme Court’s analysis suggests otherwise. Plaintiff Roger Reeves presented sufficient evidence to prove that the defendant’s legitimate nondiscriminatory reason was not believable.²⁷⁵ However, he also submitted evidence of age-based animus.²⁷⁶ As the Court related, the manager who participated in the decision to terminate Reeves told Reeves that he “was so old [he] must have come over on the Mayflower” and that he “was too damn old to do [his] job.”²⁷⁷ Another manager in a similar position as Reeves, Oswalt, who was 24 years younger, testified that the manager treated him and Reeves differently, including treating the plaintiff like he was a child.²⁷⁸ Although the Court ruled that the jury could (and, by the way, did) find for the plaintiff under these circumstances,²⁷⁹ there was fairly compelling evidence in this case that the key decisionmaker was motivated by age-based animus. Therefore, plaintiffs may still need a smoking gun in cases such as this one, even when they prove that the employer’s legitimate nondiscriminatory reason is bunk.²⁸⁰

In 1995, the Court took on equal protection analysis as applied to the federal government in *Adarand Constructors, Inc. v. Peña*.²⁸¹ In 1997, the Court heard *City of Boerne v. Flores*, and, combined with *Adarand*, this sounded the death knell of the Court’s deference to Congress in determining what legislation is necessary to address discrimination in American society.²⁸² In *Adarand*, the Court overruled its decision in *Metro Broadcasting*, applying strict scrutiny to federal race-conscious programs.²⁸³ While the Court remanded to the lower court

273. *Id.* at 147.

274. *See id.* at 140-41 (citing cases revealing split in the circuits on this issue).

275. *Id.* at 153-54.

276. *Id.* at 151.

277. *Id.* (internal quotation marks omitted).

278. *Id.*

279. *Id.* at 153-54.

280. Not surprisingly, some lower courts do not agree that the Court in *Reeves* actually rejected the pretext-plus analysis. The Second and Seventh Circuits, in particular, still use a pretext-plus analysis. *See Kulumani v. Blue Cross Blue Shield Ass’n*, 224 F.3d 681, 684 (7th Cir. 2000); *Zimmerman v. Assocs. First Capital Corp.*, 251 F.3d 376, 382 (2d Cir. 2001). The Fourth, Fifth, Sixth, Ninth, and Eleventh have followed the permissive pretext only standard—essentially, if the trier of fact finds defendant’s explanation pretextual, the trier of fact is permitted, but not required, to find for the plaintiff. *See Ratliff v. City of Gainesville, Tex.*, 256 F.3d 355, 361 (5th Cir. 2001); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 854 (4th Cir. 2001); *Ross v. Campbell Soup Co.*, 237 F.3d 701, 709 (6th Cir. 2001); *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1128 (9th Cir. 2000); *Hinson v. Clinch Cnty., Ga. Bd. of Educ.*, 231 F.3d 821, 831-32 (11th Cir. 2000).

281. 515 U.S. 200, 229 (1995).

282. 521 U.S. 507, 519-20 (1997).

283. *Adarand Constructors*, 515 U.S. at 233, 235.

for reconsideration given the implementation of the new standard, the dissenters objected strenuously to the Court's equating a program designed to help racial minorities with one designed to hinder their progress.²⁸⁴ Justice Stevens's oft-quoted response to the majority position is worth noting here: "The consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat."²⁸⁵ Justice Stevens also explained that the Court should grant Congress more deference than the states because the Fourteenth Amendment specifically grants Congress the authority to remedy discrimination.²⁸⁶ Further, he argued that the program's presumption of disadvantage based on minority status was well justified:

The presumption of social disadvantage reflects the unfortunate fact that irrational racial prejudice—along with its lingering effects—still survives. The presumption of economic disadvantage embodies a recognition that success in the private sector of the economy is often attributable, in part, to social skills and relationships. Unlike the 1977 set-asides, the current preference is designed to overcome the social and economic disadvantages that are often associated with racial characteristics.²⁸⁷

In Stevens's analysis, Congress is empowered to remedy this discrimination. Both Justices Souter and Ginsburg, in separate dissents, agreed that Congress's authority goes beyond remedying present discrimination and encompasses the lingering effects of past discrimination as well.²⁸⁸ In her dissent, Justice Ginsburg charted the history of race discrimination in the United States, ultimately concluding that the effects of such discrimination "are evident in our workplaces, markets, and neighborhoods."²⁸⁹

In many ways, the full import of *Adarand* was not felt until the Court's decision in another area of antidiscrimination law: religious discrimination. *City of Boerne v. Flores* is less about the Court's discrimination rhetoric and more about its position on congressional authority to enact legislation to address discrimination.²⁹⁰ However, because Congress has traditionally had authority in this area and the Court has (at least in the past) respected that authority, the line of cases beginning with *Boerne* reveals something about the Court's attitude toward the prevalence of discrimination in American society. Just as the Court placed increasing burdens on plaintiffs to provide evidence of discrimination, so too did it increase the fact-finding burden on Congress. Essentially, both plaintiffs and Congress must provide a smoking gun.

284. *Id.* at 243 (Stevens, J., dissenting).

285. *Id.* at 245.

286. *Id.* at 255.

287. *Id.* at 260-61 (footnote omitted). At one point, Justice Stevens noted that leaders in the industry have a history of "doing business with their golfing partners," and that minority group members do not have access to such networks. *See id.* at 261.

288. *Id.* at 269 (Souter, J., dissenting); *id.* at 273 (Ginsburg, J., dissenting).

289. *Id.* at 273.

290. For more on the Court's inroads into congressional authority, see Colker & Brudney, *supra* note 56, at 104.

In *Boerne*, the Court held that the Religious Freedom Restoration Act (“RFRA”) exceeded Congress’s authority under Section 5 of the Fourteenth Amendment to make laws to enforce that amendment.²⁹¹ In RFRA, Congress restored strict scrutiny as the level of review the courts would use to assess neutral state and local laws that “substantially burden a person’s exercise of religion.”²⁹² Concluding that RFRA “contradicts vital principles necessary to maintain separation of powers and the federal balance,” the Court held it unconstitutional.²⁹³ While Congress can enforce the rights protected in the Fourteenth Amendment, the Court said it cannot “chang[e] what the right is.”²⁹⁴ Instead, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”²⁹⁵ At a practical level, this means that Congress must engage in sufficient fact finding as to states’ constitutional violations to justify the law²⁹⁶ and tailor its remedial legislation to the particular constitutional violation its fact finding revealed.²⁹⁷ While the Court uses language that resonates with federalism and separation of powers,²⁹⁸ subsequent cases make clear that Congress, like litigants, must back up its allegations of states’ discriminatory actions with facts supporting extensive violations.²⁹⁹

The effects of this case on Congress’s antidiscrimination laws became more apparent in *Kimel v. Florida Board of Regents*, in which the Court took on an

291. *City of Boerne*, 521 U.S. at 536.

292. 42 U.S.C. § 2000bb-1(a)-(b) (2006).

293. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). RFRA was Congress’s attempt to legislatively overrule *Employment Division v. Smith*, 494 U.S. 872 (1990), a case holding that the strict test established in *Sherbert v. Verner*, 374 U.S. 398 (1963), was inapplicable. In *Sherbert*, the Court held that if a state law substantially burdened a religious practice, the state would be required to support that burden by the assertion of a compelling interest. *Id.* at 403, 406. Congress disagreed and sought to reinstitute the *Sherbert v. Verner* test. *See Boerne*, 521 U.S. at 512-15 (discussing *Smith*).

294. *City of Boerne*, 521 U.S. at 519.

295. *Id.* at 520.

296. *See id.* at 530.

297. *See id.* at 532.

298. *See id.* at 534 (“This is a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”); *id.* at 536 (“When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.”).

299. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000) (ADEA); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2000) (ADA). In *Nevada Department of Human Resources v. Hibbs*, the Court held that the United States had made a sufficient showing to exercise its Section 5 power when it enacted the Family and Medical Leave Act. 538 U.S. 721, 730-35 (2003). A distinguishing feature of the FMLA is that it involved sex discrimination, which Justice Rehnquist, for the majority, reasoned gave Congress more leeway in providing prophylactic remedies because sex as a category already was entitled to intermediate scrutiny. *Id.* at 737. Justice Rehnquist explicitly distinguished *Kimel* and *Garrett* on this ground. *See id.* Interestingly, part of the reasoning in *Hibbs* was that there was stereotyping of men that “presum[ed] a lack of domestic responsibilities” on their part. *Id.* at 736. Thus, the discrimination Congress was reaching was two-fold: discrimination against women based on stereotypes of motherhood and discrimination against men based on stereotypes of fatherhood. *Id.*

area of traditional employment discrimination law: the Age Discrimination in Employment Act ("ADEA").³⁰⁰ In *Kimel*, the Court held that in applying the ADEA to the states, Congress had exceeded its authority under Section 5 of the Fourteenth Amendment.³⁰¹ The ADEA flunked the congruence and proportionality test set out in *Boerne*.³⁰² The Court decided the case against the backdrop of the rational basis standard that applies to age discrimination by a state.³⁰³ Because age is not a suspect class, "an age classification is presumptively rational."³⁰⁴ The Court reasoned that "[t]he Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."³⁰⁵ Thus, for such legislation to be constitutional, Congress, like an age discrimination litigant, must prove violations that overcome the highly deferential rational basis standard applicable to age.

Further, the Court reasoned that Congress's fact finding did not support such a sweeping remedy. Examining the legislative history, the Court concluded that

Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. That evidence consists almost entirely of isolated sentences clipped from floor debates and legislative reports.³⁰⁶

In addition, Congress's reliance on a report prepared by California and evidence from the private sector was misplaced.³⁰⁷ Even if California's evidence suggested age discrimination by that state, it "would have been insufficient to support Congress' 1974 extension of the ADEA to every State of the Union."³⁰⁸ Instead, Congress must show that the problem has become one of "national import."³⁰⁹ According to the Court, the private sector evidence was "beside the point. Congress made no such findings with respect to the States."³¹⁰ So, to justify such remedial legislation, Congress must "identify a widespread pattern of

300. *Kimel*, 528 U.S. at 66-67.

301. *Id.* at 67, 91.

302. *Id.* at 86.

303. *Id.* at 84, 86.

304. *Id.* at 84.

305. *Id.* at 86.

306. *Id.* at 89.

307. *Id.* at 90.

308. *Id.*

309. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 90 (2000) (quoting *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 641 (1999)).

310. *Id.* Why the Court presumes the states are more virtuous than private actors remains a mystery.

age discrimination by the States.”³¹¹ Later case law makes clear that it is the states and only the states—not political subdivisions—that count toward this fact finding.³¹² Not only did Congress receive little deference from the Court, its fact finding was scrutinized in detail and found lacking. As with private discrimination plaintiffs, the Court will not presume that discrimination exists in the working world of state governments that Congress needs to remedy; Congress must prove such discrimination to the Court’s satisfaction.³¹³

At initial glance, the race-conscious remedies in higher education cases appear to grant a bit of a reprieve from the Court’s anti-antidiscrimination rhetoric. On closer examination, however, they too reveal a shift away from acknowledging the prevalence of discrimination in American society. In *Gratz v. Bollinger*³¹⁴ and *Grutter v. Bollinger*,³¹⁵ the Court outlined the parameters of constitutional race-conscious admissions programs in higher education. In *Grutter*, the Court held that diversity in the student body was a compelling state interest that would satisfy the strict scrutiny standard.³¹⁶ As the Court described it, the University of Michigan Law School’s policy “did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not

311. *Id.* at 90-91. In a dissent in *Nevada Dep’t of Human Resources v. Hibbs*, Justice Scalia makes his view of this requirement plain:

The constitutional violation that is a prerequisite to “prophylactic” congressional action to “enforce” the Fourteenth Amendment is a violation *by the State against which the enforcement action is taken*. There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States.

538 U.S. 721, 741-42 (2003) (Scalia, J., dissenting) (emphasis in original).

312. In *Board of Trustees of the Univ. of Ala. v. Garrett*, the Court made clear that discrimination by local governmental units, such as counties and cities, was irrelevant to determining whether Congress possessed sufficient evidence of disability discrimination to make it applicable to the states. 531 U.S. 356, 368-69 (2001).

313. The dissent in *Garrett* suggests a difference between the detailed, state-specific analysis the majority requires before Congress can effectively use its Section 5 powers and what a broader concept of societal discrimination might warrant. *Id.* at 377-78 (Breyer, J., dissenting). To the dissenters, Congress provided “a vast legislative record documenting ‘massive, society-wide discrimination’” against persons with disabilities.” *Id.* at 377 (quoting S. REP. NO. 101-116, at 8-9 (1989) (internal citation omitted)). The dissenters were open to extending societal discrimination to acts of the states:

The powerful evidence of discriminatory treatment throughout society in general, including discrimination by private persons and local governments, implicates state governments as well, for state agencies form part of that same larger society. There is no particular reason to believe that they are immune from the “stereotypic assumptions” and pattern of “purposeful unequal treatment” that Congress found prevalent.

Id. at 378.

314. 539 U.S. 244 (2003).

315. 539 U.S. 306 (2003).

316. *Id.* at 325.

been the victims of such discrimination.”³¹⁷ Thus, the Court did not take into account the lingering effects of past discrimination or even present discrimination. The Court hit upon a rationale that did not require it to recognize the inequities in American society at all. In doing so, the Court gave deference to University administrators that it had not given to Congress. As Justice O’Connor, for the majority, explained, “Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”³¹⁸ Therefore, the majority presumed good faith on the part of the University administrators.³¹⁹

The diversity rationale simultaneously represents a powerful and a weak rationale for race-conscious programs. This rationale is powerful in that it should always work as a value that can be considered in the admissions process (and anywhere else it may apply).³²⁰ Although Justice O’Connor surmised in her majority opinion in *Grutter* that such programs may not be required in 25 years,³²¹ it is unclear why diversity as a rationale for race-conscious programs would cease to be a value school administrators should consider in admissions. Possibly, she meant that someday an abundance of diverse students will have records of high achievement based on traditional indicia. Maybe (and hopefully) this will be the case. However, the race of these high-achieving students and the diversity of perspective that the indicia of race signifies should still be something that would be valuable in assessing who should be admitted. Thus, although the majority made much of the durational limits of race-conscious programs,³²² logically, durational limits do not appear warranted.³²³ This makes diversity a more powerful rationale in that it has no ending point.³²⁴ In addition, others have

317. *Id.* at 319.

318. *Id.* at 328.

319. *Id.* at 330.

320. In the most recent Supreme Court case involving a diversity rationale, the Court determined that a K-12 public education student assignment plan was not sufficiently narrowly tailored for strict scrutiny purposes. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007). Justice Kennedy, the swing voter who created a majority, opined that state and local authorities can consider the racial makeup of schools and adopt general policies to encourage a diverse student body. *Id.* at 788-89 (Kennedy, J., concurring in part and concurring in the judgment). Thus, Kennedy, plus the four dissenters, make up a majority that believe diversity in K-12 education is a compelling state interest. They disagree, however, about the means used to achieve that diversity.

321. *Grutter*, 539 U.S. at 343. This is a position that both Justices Ginsburg and Breyer, who joined in the majority opinion, believe is wishful thinking on Justice O’Connor’s part. *See id.* at 345 (Ginsburg, J., concurring).

322. *Id.* at 341-42 (majority opinion).

323. *See* Kang & Banaji, *supra* note 8, at 1116 (explaining that “if racial integration produces pedagogical advantages through ‘diversity,’ why should those benefits evaporate twenty-five years from now?”).

324. Kang and Banaji suggest that race conscious programs should end “when the nation’s implicit bias against those social categories goes to zero or its negligible behavioral equivalent.” *Id.*

argued that the diversity rationale can be extended to other contexts—including Title VII, Title IX, and jury selection.³²⁵

But diversity is also a weaker rationale. Diversity allows the University of Michigan and society to relieve itself of the obligation to correct persistent discrimination in its admissions programs and other aspects of society. While diversity is appealing because it casts no blame, it essentially lets everyone off the hook for acts of current discrimination that are often hard to identify as well as for perpetuating systems of discrimination that lead to persistent inequality in American society.³²⁶ Social science research suggests that it is difficult for groups to right wrongs if wrongdoers do not take responsibility for them.³²⁷ The diversity rationale allows members of the white majority to relieve themselves of any responsibility for perpetuating discrimination, or from acknowledging that they continue to receive benefits as a result of this discrimination. This diverges from early Supreme Court case law in which the Court acknowledged the prevalence of discrimination in American society and the need for society to be active in seeking a remedy.³²⁸

IV. WHY THE SHIFT?

During the course of the case descriptions above, I have identified three underlying shifts in the Court's antidiscrimination rhetoric. First, in the 1970s, the Court was much more willing to presume discrimination. Today, persons accusing employers or public actors of discrimination must provide smoking-gun evidence of discriminatory intent in the particular case to convince the Court that discrimination has occurred. Second, this smoking-gun evidence is not limited to civil-rights plaintiffs: the Court also has increased Congress's fact-finding obligations. Where once the Court deferred to Congress's capabilities in creating national social policy to combat discrimination, today the Court is skeptical, requiring Congress to uncover nationwide discriminatory practices by public actors before it can successfully invoke its Section 5 powers to remedy perceived discrimination. Finally, throughout all these cases, the Court has shifted away from acknowledging the continuing effects of past discrimination on the

325. See, e.g., Robert A. Caplen, *When Batson Met Grutter: Exploring the Ramifications of the Supreme Court's Diversity Pronouncements Within the Computerized Jury Selection Paradigm*, 10 U. PA. J. CONST. L. 65, 121 (2007).

326. John Morrison identified a similar phenomenon with "colorblind" arguments used to thwart race-conscious programs. John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 324 (1994).

327. See Adjoa Artis Aiyetoro, *Truth Matters: A Call for the American Bar Association to Acknowledge Its Past and Make Reparations to African Descendants*, 18 GEO. MASON U. CIV. RTS. L.J. 51, 94-95 (2007).

328. The most recent cases on retaliation, while seemingly plaintiff-friendly, are consistent with these themes. While in all of them the Court was willing to extend protection to victims of retaliation, the retaliation was ascribed to an individual bad actor. Thus, it did not require the Court to remedy or even acknowledge unconscious or societal discrimination. See generally *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, Tenn., 129 S. Ct. 846 (2009); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

economic opportunities of people of color and others, societal discrimination, and subtle and/or unconscious racism. Instead, the Court now views discrimination as the result of the acts of isolated bad actors—not something that is a common problem most people have or a systemic problem. These themes occur across all three shifts. The Court needs compelling evidence of discrimination, because otherwise it cannot identify that “bad apple,”³²⁹ whether that actor is a particular private employer or the states. The Court does not assume that discrimination is a society-wide problem going beyond individual bad actors.³³⁰

Why this shift? Has American society become so equal that race and other forms of discrimination no longer exist? That is unlikely.³³¹ So what accounts for the Court’s skepticism regarding discrimination claims? I suggest several potential sources of the shift. One source is an obvious one: changes in Supreme Court personnel. This explanation, however, only gets us so far. To a certain extent, these Justices reflect the Presidents who appointed them, and those Presidents reflect the society that elected them. Thus, I also explore changes in public interest law as well as in society more generally to see if court personnel merely reflect a larger legal, political, and social movement.

A. Court Personnel

Lawyers, like political scientists,³³² often look to changes in Court personnel to explain shifts in the law.³³³ Political scientists have long argued that the behavior of U.S. Supreme Court Justices can be explained by their attitudes about various issues.³³⁴ Thus, judges appointed by a Democratic President tend to vote more liberally, and judges appointed by a Republican President tend to vote more conservatively.³³⁵ While this is not the only model of judicial decision

329. This is Anne Lawton’s term, which she developed in the context of sexual harassment jurisprudence. See Lawton, *supra* note 5, at 817.

330. Except in dissents. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 552 (1989) (Marshall, J., dissenting); *Wards Cove Packing, Inc. v. Atonio*, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 269 (1995) (Souter, J., dissenting); *Gratz v. Bollinger*, 539 U.S. 244, 298-301 (2003) (Ginsburg, J., dissenting).

331. See *infra* notes 445-455 and accompanying text.

332. Political scientists have long thought changes in Court personnel signal changes in court decisions. See Christopher E. Smith & Thomas R. Hensley, *Assessing the Conservatism of the Rehnquist Court*, 77 JUDICATURE 83, 86 (1993) (explaining that “[m]embership change was a ‘dominant force’ in decision-making changes that occurred during the Warren and Burger eras”).

333. For example, commentators have leveled criticism at the Rehnquist Court’s conservative judicial activism. See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1053 (2001); Cass R. Sunstein, Op-Ed., *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23; Larry D. Kramer, Op-Ed., *The Supreme Court v. Balance of Powers*, N.Y. TIMES, Mar. 3, 2001, at A13.

334. Robert J. Hume, *The Use of Rhetorical Sources by the U.S. Supreme Court*, 40 LAW & SOCIETY SOC’Y REV. 817, 819 (2006). See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993). One scholar has gone so far as to call Chief Justice Rehnquist the “poster child” of the attitudinal model. See Harold J. Spaeth, *Chief Justice Rehnquist: “Poster Child” for the Attitudinal Model*, 89 JUDICATURE 108, 108 (2005).

335. See Robert A. Carp et al., *President Clinton’s District Judges: “Extreme Liberals” or Just Plain Moderates?*, 84 JUDICATURE 282, 285 tbl.1 (2001) (describing voting patterns of various

making,³³⁶ it does explain some Supreme Court decision making.³³⁷ Yet, in some instances judicial decision making has not remained stagnant. Judges can change their voting patterns as their ideas concerning constitutional interpretation evolve and they confront new issues that might lead them to reconceptualize their approaches to key concepts.³³⁸

While the Rehnquist Court was generally seen as a conservative-leaning Court, interestingly, studies of its record in civil rights cases reveal that it was no more conservative than its predecessor, the Burger Court.³³⁹ An exception to this is provided in racial equity cases, in which the Rehnquist Court was more conservative than both the Warren and Burger Courts.³⁴⁰ The Rehnquist Court was also less liberal in race-conscious program cases, voting for the liberal position 46% of the time, compared to the Burger Court, which voted liberally 62% of the time.³⁴¹ Thus, in cases that are important for the “shift,” the Rehnquist Court was less liberal. Indeed, changes in the Justices accounts for some key “shift” jurisprudence.

judges by appointing president). Of course, there are some notable exceptions, including Justice Souter, who generally was considered part of the “liberal block” of the Court in spite of his appointment by President George H.W. Bush. See Ryan J. Owens & Lee Epstein, *Amici Curiae During the Rehnquist Years*, 89 JUDICATURE 127, 131 (2005) (placing Justice Souter in the “liberal wing” of the Court); Christopher E. Smith & Thomas R. Hensley, *Decision-Making Trends of the Rehnquist Court Era: Civil Rights and Liberties Cases*, 89 JUDICATURE 161, 163 (2005) (noting that Souter “cast more liberal votes on key issues than [his] appointing president[] would have predicted”). Indeed, in one calculation involving civil rights/liberties cases, Justice Souter voted more often liberally (percentage-wise) than Democrat-appointed Justice Breyer. See *id.* at 164 tbl.3.

336. See Hume, *supra* note 334, at 819 (discussing the “strategic model,” which posits that judges often tailor decisions to gain support of other Justices as well as those “whose support is necessary to bring about the opinion writer’s goals”). See also Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 29-31 (1997) (discussing separation of powers model, which posits that the Court must consider and, at times defer, to legislative preferences, especially in cases in which its decision can be legislatively overturned).

337. See SEGAL & SPAETH, *supra* note 334, *passim*.

338. See Smith & Hensley, *supra* note 332, at 86. See also Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581, 581 (1996) (“Justices, unlike computers, do not react automatically or always ‘stay put’”) (quoting Warren Burger, letter to William O. Douglas (July 27, 1972)).

339. Smith & Hensley, *supra* note 335, at 163 tbl.1. The authors of this study note that it is unclear whether the liberal votes in the Rehnquist era merely preserved rights as they were or expanded them, as was clearly the case in the Warren Court and, to a lesser extent, in the Burger Court. See *id.* at 164. Thus, the Rehnquist Court may not be as liberal in the sense of expanding rights.

340. *Id.* at 166 tbl.5, 167, 184. In particular, in racial equity cases, the Warren Court supported the liberal position (e.g., the plaintiff) 94% of the time, the Burger Court, 67% of the time, and the Rehnquist Court, 57% of the time. See *id.*

341. *Id.* at 166 tbl. 5. The pattern does not work for gender equality cases, in which the Burger Court held in favor of the liberal position 64% of the time, compared to the Rehnquist Court’s 75% of the time. *Id.*

The Court's Section 5 jurisprudence provides an example of how changes in Court personnel affected outcomes in these cases.³⁴² The retirements of Chief Justice Burger and Justice Marshall and their replacements by Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas provided the votes necessary to scale back Congress's authority under Section 5 of the Fourteenth Amendment. Chief Justice Burger and Justice Marshall gave wider latitude to the federal government (in particular, Congress and the executive branch) to remedy race discrimination than Justices Scalia and Thomas.³⁴³ For example, in *Fullilove v. Klutznick*, Chief Justice Burger and Justice Marshall supported Congress's minority-business-enterprise program.³⁴⁴ Even in *Washington v. Davis*, Chief Justice Burger, considered conservative,³⁴⁵ was among the group suggesting that Congress had the authority to make disparate impact claims brought against the federal government viable.³⁴⁶ Thus, he had a broader view of congressional authority to remedy discrimination than Justices Rehnquist, Scalia, or Thomas. It was not until after Chief Justice Burger left the Court that the Court reined in both states and the federal government on race-conscious programs.³⁴⁷ Indeed, without Justice Thomas's vote in *Adarand v. Peña*, the Court likely would have continued to subject federal race-conscious programs to the more forgiving intermediate scrutiny standard set out by the Court in *Metro Broadcasting, Inc. v. FCC*.³⁴⁸

Justice Rehnquist's elevation to Chief Justice, along with the subsequent additions of Justices Scalia and Thomas, apparently helped move Rehnquist from the "lone voice on the conservative fringe of the Court to a position at the heart of a solidly ensconced conservative majority."³⁴⁹ In his early days on the Court, Justice Rehnquist was somewhat aligned with more conservative Nixon

342. An earlier shift occurred with the retirement of Chief Justice Earl Warren. Jeffery A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 104 (1989) ("The resignations of Earl Warren and Abe Fortas had a strong and immediate impact on the Court's civil liberties divisions. The percent liberal dropped from 80.3 per cent in the 1968 term to 54.5 per cent in the 1969 term."). This shift is not discussed here because most of the cases discussed in this article occurred in the late 1980s and 1990s.

343. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 453 (1980) (Burger, C.J., announcing the judgment of Court); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 218 (1979) (Burger, C.J., dissenting) (arguing that Congress could authorize race-conscious programs under Title VII).

344. *Fullilove*, 448 U.S. at 477 (Burger, C.J., announcing the judgment of the Court); *id.* at 517 (Marshall, J., concurring).

345. Chief Justice Burger might well fit a model of conservatism that favors majoritarian rule. See Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1197-99, 1203-09 (2002).

346. 426 U.S. 229, 248 (1976).

347. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). See also *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

348. 497 U.S. 547 (1990). Justice Thomas also provided the necessary fifth vote on many of the Rehnquist Court's federalism cases, which reinvigorated states' rights at the expense of Congress' Section 5 powers. See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 457-59, 480 (2002).

349. SEGAL & SPAETH, *supra* note 334, at 108.

appointees Justices Burger, Powell, and Blackmun, but Justice Rehnquist was clearly more conservative than these colleagues. Compared to Justices Burger and Powell, Justice Rehnquist supported liberal outcomes in civil-liberties cases only 26% of the time, whereas Burger and Powell supported liberal outcomes 34% and 35% of the time respectively.³⁵⁰ Instead, while a member of the Burger Court, Justice Rehnquist wrote the most solo dissents, mostly in constitutional cases involving civil rights and liberties.³⁵¹ As political scientists have noted, “For example, he never once voted liberally in any of the Burger Court’s formally decided—i.e., orally argued—nonunanimous sex discrimination cases.”³⁵² Once Justices Scalia and Thomas joined the Court, Justice Rehnquist’s solo dissent rate dropped precipitously.³⁵³

Others have suggested that Chief Justice Rehnquist was ambivalent on issues of race, and when race issues conflicted with other values he considered important, race discrimination plaintiffs inevitably did not garner his vote.³⁵⁴ This corresponds with some of the Rehnquist Court’s race discrimination decisions. As Professor Michael Selmi has pointed out, “Every time there was a conflict between racial equality and some other identifiable value, the Court was quick to compromise the pursuit of racial equality.”³⁵⁵ The Rehnquist Court’s race-conscious program jurisprudence deviated from this compromise of racial equality, reflecting divisions within the Court’s conservative block. Justice O’Connor, the key swing vote in the Michigan Law School race-conscious program case, took Powell’s approach in *Bakke*.³⁵⁶ Her conservative brethren did not agree. Of course, Chief Justice Rehnquist disagreed with the majority in that case.³⁵⁷

The Rehnquist Court’s race-conscious program jurisprudence also reflects another key shift: the increasing left-leaning of Justice Stevens. In his early days on the Court, Justice Stevens was a race-conscious program skeptic, voting against the University of California at Davis in *Bakke*,³⁵⁸ the City of Richmond in *City of Richmond v. J.A. Croson Co.*,³⁵⁹ and dissenting in *Fullilove v. Klutznick*, in which he argued that the federal government’s minority business enterprise

350. *Id.* at 109.

351. *Id.* at 110. Rehnquist wrote 62 solo dissents, and 53 of them involved civil rights and civil liberties. *Id.*

352. *Id.*

353. He had a total of only eight as Chief Justice. *Id.*

354. See TUSHNET, *supra* note 8, at 23.

355. Selmi, *supra* note 2, at 347.

356. Compare *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003) (contending that *Bakke* is “the touchstone for constitutional analysis of race-conscious admissions policies: and heavily relying on the proposition that race was a legitimate factor to consider in law school admission), with *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 271 (1978) (stating that race-conscious admissions policies does not violate the Equal Protection Clause and that race or ethnic origin is a legitimate consideration in an appropriately designed admissions program at a medical school).

357. *Grutter*, 539 U.S. at 378 (Rehnquist, C.J., dissenting).

358. *Bakke*, 438 U.S. at 271.

359. 488 U.S. 469, 511, 515 (1989) (Stevens, J., concurring in part & concurring in judgment).

program was not sufficiently narrowly tailored to meet strict scrutiny.³⁶⁰ Yet, six years later in *Adarand*, Justice Stevens dissented, arguing that the federal government's minority business enterprise program in that case should not be greeted with the same skepticism as state programs.³⁶¹ And, eight years after *Adarand*, in *Grutter*, he joined the majority in upholding the University of Michigan Law School's race-conscious admissions program.³⁶² Thus, viewing the Justices' positions as stagnant would be inaccurate.³⁶³ Perhaps the best way to account for the shift is by examining the influence of larger legal, political, and societal forces.

B. *The Rise of the Conservative Public Interest Law Firm*

In many ways, the shift in the Court's approach to discrimination might well reflect a shift in a segment of the legal establishment toward conservatism. In his book *The Rise of the Conservative Legal Movement*,³⁶⁴ Steven Teles argues that the election of conservative public officials who then appointed conservative judges does not fully account for the shifts in law over the past 20 years.³⁶⁵ Instead, "'partisan entrenchment' occurs not only in courts, but also in the social institutions that feed the courts with ideas, personnel, and cases."³⁶⁶ Therefore, perhaps the rise of conservatism in law that evolved on several fronts at once—in academia, in legal organizations, and eventually in the courts—accounts for the shift.

Of particular importance for understanding the Court's shift in antidiscrimination rhetoric is the rise of conservative public interest law firms that seek to espouse a libertarian form of conservatism in law, resulting in some pivotal shift-producing cases.³⁶⁷ For example, the Center for Individual Rights ("CIR"), a conservative public interest law firm that took cases promoting issues of concern to libertarians, brought the University of Michigan undergraduate and law school cases, as well as *Adarand v. Pena*, and *United States v. Morrison*, the

360. 448 U.S. 448, 552 (1980) (Stevens, J., dissenting).

361. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 253 (Stevens, J., dissenting). This case provides his famous quote: "The consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat." *Id.* at 245.

362. *Grutter*, 539 U.S. at 343.

363. See SEGAL & SPAETH, *supra* note 334, at 106 (noting shifts in the voting patterns of Justices Black and White).

364. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008). Two legal scholars have reviewed Teles' book. See, e.g., Mark Tushnet, *What Consequences Do Ideas Have?*, 87 TEX. L. REV. 447 (2008) (book review); Michael Avery, *The Rise of the Conservative Legal Movement*, 42 SUFFOLK U. L. REV. 89 (2008) (book review).

365. TELES, *supra* note 364, at 10.

366. *Id.* at 11.

367. Of course, these are not the only organizations pushing a conservative legal agenda, but they do have influence on cases that are of importance in this article. For a general description of various forms of conservative advocacy, see Anthony Paik et al., *Lawyers of the Right: Networks and Organization*, 32 LAW & SOC. INQUIRY 883 (2007).

Violence Against Women Act case that curtailed Congress's Section 5 power.³⁶⁸ The rise of conservative public interest law firms in some ways mirrored a rising conservative political movement that gained ground beginning in the 1970s and eventually took hold during the Reagan Administration in the 1980s.³⁶⁹ However, rather than touting traditional conservatism (in terms of economic and social issues), the successful approach took a more libertarian turn.³⁷⁰ The case law directly reflects efforts by the conservative legal movement, with its libertarian approach, to take advantage of opportunities as they arose.

To understand this movement's impact on the rhetoric of antidiscrimination law, it is important to understand it as a reaction to legal liberalism, which produced many of the early cases described in this article. The "liberal legal network" (as Steven Teles calls it) extended individual rights throughout the 1960s and 1970s and entrenched notions of legal liberalism in prestigious legal institutions, such as the American Bar Association and elite law schools.³⁷¹ As Teles explains, "These law professors, in conjunction with an increasingly liberal judiciary, devoted their scholarship to legitimating an assertive role for courts in advancing egalitarian social goals."³⁷² This change was accompanied by an ideological shift in law students in the early 1970s, who, impassioned by the unrest of the 1960s, demanded that law schools become more "relevant," giving rise to liberal-leaning legal clinics.³⁷³ In addition, legal academia also became liberal. During these changes, the Ford Foundation began funding public interest law firms supporting liberal causes.³⁷⁴ The result was a cadre of liberal-leaning law students, trained by liberal law professors, who were willing to work for liberal causes once they entered practice.³⁷⁵

It took time for the conservative legal movement to hit upon a strategy that would counter what they considered the hegemony of legal liberalism. Initial attempts at starting conservative public interest firms failed, largely because they were seen as too aligned with business and less working for the "public interest."³⁷⁶ In addition, the movement had some philosophical problems. Conservatives had not traditionally seen the courts as an avenue for reform.³⁷⁷ Instead, they tended to rely on Congress and dispersed local power.³⁷⁸ They also

368. TELES, *supra* note 364, at 220-29.

369. See JOHN MICKELTHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* 71-80 (2004).

370. I say the approach that "had success" because the first wave of conservative public interest law was largely unsuccessful. In part this was due to its lack of a true "public interest" focus. Instead, these early organizations were largely aligned with the interests of business, which was not seen as "public interest." Thus, these firms looked like shills for big business, rather than champions of the people. See TELES, *supra* note 364, at 68-69.

371. *Id.* at 22-23.

372. *Id.* at 23.

373. *Id.* at 40-41.

374. *Id.* at 46-52.

375. *Id.* at 51.

376. See *id.* at 58-59. See also Paik et al., *supra* note 367, at 885-86.

377. TELES, *supra* note 364, at 60.

378. See *id.* at 60, 68.

encountered difficulties because the early conservative movement's business base did not necessarily agree with libertarian causes when they worked against the interests of particular businesses.³⁷⁹ Thus, even after five years of judicial appointments by President Ronald Reagan, conservative lawyers had not yet been able to bring the cases that would have appealed to these conservative-leaning judges.

Eventually, conservative lawyers realized that they could use these conservative judges by bringing cases that would allow for conservative legal change in the courts.³⁸⁰ Additionally, leaders of the conservative legal movement recognized the need for scholars who would research and write on these issues as well as teach young lawyers who would pursue cases relevant to the movement's interests.³⁸¹ The law and economics movement beginning to bloom in legal academia became a natural fit for furthering conservative interests in law schools. The advantage of law and economics was two-fold. First, business funded law and economics without trying to dictate how the money was spent—a problem for early public interest law firms.³⁸² Second, law and economics did not try to present the “other side” of liberal arguments, but instead challenged the foundations of those arguments, including the public interest rationale upon which legal liberals had long relied.³⁸³ Law and economics provided an entry for conservative faculty members and created a network of support for more conservative-leaning academics.

The Federalist Society became another natural association for this conservative movement. In the early 1980s, law students at prestigious law schools founded the Federalist Society in response to the liberal ideology that predominated at American law schools.³⁸⁴ Orrin Hatch, one of the Society's members, described its position as follows: “The Federalist Society espouses no official dogma. Its members share acceptance of three universal ideas: One, that government's essential purpose is the preservation of freedom; two, that our Constitution embraces and requires separation of governmental powers; and, three that judges should interpret the law, not write it.”³⁸⁵ True to its “no official dogma” tradition, the Society committed itself to intellectual debate rather than taking positions on particular issues.³⁸⁶ Thus, while legal liberalism had apparently cornered the market on ideas in the academy early on, the Federalist Society became an influential conservative alternative. By focusing on debate, the Society avoided factionalism, which had caused problems for other conservative groups.³⁸⁷ Members of the Federalist Society soon entered other arenas in which legal liberalism had predominated. In particular, the Reagan

379. *Id.* at 68-69.

380. *Id.* at 78.

381. *Id.* at 81.

382. *Id.* at 90.

383. *Id.*

384. *Id.* at 137-38.

385. *Id.* at 152.

386. *Id.* at 137.

387. *Id.* at 143-44.

Administration hired many of the Federalist Society's founders as lawyers.³⁸⁸ The Society's structure eventually included an influential District of Columbia branch, student and lawyer chapters, and practice groups.³⁸⁹

One of the group's main functions was providing networking opportunities for its members. As the Society explains, it has "created a conservative and libertarian intellectual network that extends to all levels of the legal community."³⁹⁰ For example, like the law and economics movement, the Federalist Society put like-minded conservative scholars (a minority in legal academia) in contact with each other.³⁹¹ The organization's debate-like nature allowed ideas to evolve. Indeed, one founding member noted that the Society's debates and understanding of the Takings Clause influenced Justice Scalia's position on the issue.³⁹² Because of its network of academics and government lawyers, the Society's members became a well-tapped resource for President George W. Bush's judicial appointments.³⁹³ Consequently, during the second Bush Administration, political scientists for the first time tracked the Federalist Society's influence on President George W. Bush's judicial appointments.³⁹⁴

Along with judicial appointments, there were attempts to place conservative lawyers in legal academia. In particular, the Olin Fellows Program was developed to help conservative lawyers gain the credentials they would need to be acceptable candidates in legal academia.³⁹⁵ Giving candidates the time to write scholarly articles proved fundamental to this effort.³⁹⁶ In addition, the conservative Olin Foundation joined the battle at Harvard to defeat the Critical Legal Studies movement by supporting law and economics at the school.³⁹⁷

388. *Id.* at 141.

389. *Id.* at 145-48.

390. *About Us*, THE FEDERALIST SOCIETY, <http://www.fed-soc.org/aboutus/> (last visited Nov. 7, 2010). See also Paik et al., *supra* note 367, at 884-85, 891 tbl.1, 897 tbl.1d, 897 (noting in their study of conservative lawyers, "Federalist Society activity appears to be associated with network centrality.").

391. TELES, *supra* note 364, at 146.

392. *Id.* at 145-46 (citing Steven Calabresi).

393. *Id.* at 158-61 (describing the Society's role). See also Paik et al., *supra* note 367, at 885.

394. See Sheldon Goldman et al., *Picking Judges in a Time of Turmoil: W. Bush's Judiciary During the 109th Congress*, 90 JUDICATURE 252, 258, 262 (2007); Sheldon Goldman et al., *W. Bush's Judiciary: The First Term Record*, 88 JUDICATURE 244, 251-54 (2005). Prior to this, the American Bar Association was the only organization whose input in the process had relevance. Of course, President George W. Bush eliminated the ABA's role in the judicial appointment process during his administration. See Goldman et al., *The First Term Record*, *supra*, at 254-55. In the end, the Federalist Society had an unintended destabilizing function. TELES, *supra* note 364, at 180. By attacking mainstream liberal organizations (such as the ABA and American law schools), the Society weakened the idea that law involved "neutral principles." *Id.* "The consequence ... is that neither the Federalist Society nor its enemies on the left can count on the authority or legitimacy that institutions of the law once held in American life." *Id.*

395. TELES, *supra* note 364, at 174-75.

396. *Id.*

397. *Id.* at 199.

At the same time, a new breed of conservative public interest law firms began to rise, including the CIR and the Institute for Justice.³⁹⁸ These organizations had very different approaches, and, for antidiscrimination law purposes, the CIR's cases have had the most impact. These new public interest law firms had a more libertarian focus and were less affiliated with business.³⁹⁹ They also knew that they could use the court system to advance their interests rather than arguing for judicial restraint.⁴⁰⁰ These organizations became "repeat players" in particular areas of law, "spread[ing] their investment in developing expertise over a large number of cases."⁴⁰¹ This is a tactic they learned from the liberal legal network, which benefitted from repeat player status.⁴⁰² The payback for this approach was impressive: "The returns on these specialized investments are a reputation for expertise, an appreciation for the strategies of opposing lawyers, a network of outside lawyers and supporting groups, and credibility with judges."⁴⁰³ These organizations used the Federalist Society to find pro bono lawyers and cases.⁴⁰⁴ While these organizations have not been wholly successful,⁴⁰⁵ they no doubt have influenced the development of several areas of law.

The idea that discrimination is caused by the occasional bad actor corresponds with the libertarian ideas of individual autonomy and responsibility espoused by these organizations.⁴⁰⁶ Under this reasoning, discrimination is no

398. *Id.* at 220. According to the mission statement on its website, CIR works in "defense of individual liberties against the increasingly aggressive and unchecked authority of the federal and state governments ... [They] aggressively litigate and publicize a handful of carefully selected cases that advance the right of individuals to govern themselves according to the natural exercise of their own reason." CIR represents clients in cases that include issues of free speech, employment discrimination, federalism, and limiting state governments' power. THE CENTER FOR INDIVIDUAL RIGHTS, http://www.cir-usa.org/mission_new.html (last visited Jan. 18, 2011). The Institute for Justice identifies its mission as litigating "to secure economic liberties, and to restore constitutional limits on the power of government." THE INSTITUTE FOR JUSTICE, <http://www.ij.org/about> (last visited Jan. 19, 2011). The Institute also states that it "challenges the ideology of the welfare state and illustrates and extends the benefits of freedom to those whose full enjoyment of liberty is denied by government." *Id.*

399. TELES, *supra* note 364, at 221.

400. *Id.*

401. *Id.* at 225.

402. *Id.* at 55. For more on the "repeat player phenomenon," see generally Kevin T. McGuire, *Repeat Players in Supreme Court Litigation: The Role of Experienced Lawyers in Litigation Success*, 57 J. POLITICS 187 (1995).

403. TELES, *supra* note 364, at 225.

404. *Id.* at 226-27.

405. This movement has had several difficulties. It has not been all that successful in recruiting lawyers who will take cases. Teles argues that "[t]his vice may be inseparable from the virtues of the more libertarian (as opposed to religious) side of conservatism: a belief system that does not celebrate an ethos of service, humility, or collective endeavor is likely to be hampered when movement activities call for just those attributes." *Id.* at 254. In addition, aside from forming a law school dedicated to these issues (George Mason), conservatives have been unable to displace the liberal legal network, including its stronghold on legal education. *Id.* at 273. Thus, legal liberals are still well entrenched in Washington, D.C., and legal academia. *Id.* at 278.

406. Morrison refers to this as "essential individualism," which he argues "enables Euro-Americans to identify the responsible individual. This understanding of individuality allows the

longer characterized as a society-wide problem, but as the problem of a few bad actors. As Linda Hamilton Krieger pointed out in 1995, "Every successful disparate treatment story needs a villain."⁴⁰⁷ For conservative public interest lawyers, the "real" problem with antidiscrimination law, especially in the area of racial preferences, is that it denies individuals opportunities.⁴⁰⁸ This tension in race-conscious program theory—between the individual and the group—is resolved in favor of the individual.⁴⁰⁹ Indeed, Justice O'Connor's approach to the race-conscious program in *Grutter* permits the individual to remain the important constitutional unit. It was the individual analysis of the law school's admissions program that saved it from the group-based fate of the undergraduate program.⁴¹⁰

The outcome in *Grutter* is also consistent with Derrick Bell's observation that black Americans only achieve equality when their interests converge with the interests of powerful whites.⁴¹¹ If having diverse students in the classroom enriches the experience of white students, the interests of black and white students have converged just as Professor Bell argued with respect to the outcome of *Brown v. Board of Education*.⁴¹²

The rise and success of conservative public interest law firms no doubt has influenced the shift in antidiscrimination case law. These lawyers developed cases and theories that would work with conservative-leaning Reagan and Bush I appointed judges. While these lawyers' efforts have not been wholly successful,⁴¹³ their influence is evident in the outcomes of both *Gratz*⁴¹⁴ and *Morrison*.⁴¹⁵ Thus, they are a piece of the puzzle accounting for the shift.

transfer of guilt to another without asking about the relationship between the 'other' and 'us.'" Morrison, *supra* note 326, at 329.

407. Krieger, *supra* note 55, at 1167.

408. See Lea Brilmayer, *Lonely Libertarian: One Man's View of Antidiscrimination Law*, 31 SAN DIEGO L. REV. 105, 123 (1994).

409. See Morrison, *supra* note 326, at 325. At the same time, employment discrimination scholars have increasingly argued for a structural approach to eliminating employment discrimination. See, e.g., Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 145 (2003) (arguing that employers should be held liable under Title VII "for organizational choices, institutional practices, and workplace dynamics that enable the operation of discriminatory bias on the basis of protected characteristics"); Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2398 (1994). In addition, behavioral realists suggest that libertarian notions of individual autonomy do not reflect how discriminatory processes work. See Blasi & Jost, *supra* note 8, at 1144, 1163.

410. But see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1538-42 (2004) (arguing that *Grutter*'s diversity rationale of serves antisubordination goals of group equality while at the same time seemingly supporting an antidiscrimination approach by insisting on individualized consideration of applicants).

411. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523-24 (1980).

412. See *id.* at 526.

413. These lawyers lost in *Grutter*, which potentially set a standard for acceptable race-conscious programs for the foreseeable future.

414. *Gratz v. Bollinger*, 539 U.S. 244, 275-76 (2003).

415. *United States v. Morrison*, 529 U.S. 598, 627 (2000).

C. Societal and Political Conservatism

In his book, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law*, Mark Tushnet argues that conservative wins and losses in Supreme Court cases reflect which faction of the conservative movement was winning in politics and in the broader American culture.⁴¹⁶ He argues that in the Court, as well as politics generally, economic conservatives have been winning, but cultural conservatives have been losing.⁴¹⁷ This argument suggests that the shift in the Court's rhetoric may be part of a larger conservative/libertarian movement in American politics and society. Both historians and political scientists have posited theories for the rise of what is referred to as modern conservatism.⁴¹⁸ Just as conservative public interest law firms began to spring up, conservative think tanks and conservative-leaning universities likewise began to marshal conservative minds into generating (or, perhaps, regenerating) the next great conservative idea. Thus, University of Chicago economists championed the free market and criticized big government,⁴¹⁹ while think tanks such as the American Enterprise Institute and the Hoover Institute developed conservative theory.⁴²⁰ These institutes represent just a few of the early conservative think tanks. Later, they were joined by other organizations such as the Heritage Foundation and the libertarian-leaning Cato Institute.⁴²¹ Meanwhile, William F. Buckley gave conservatives a popular voice in the *National Review*, which he started in the 1950s and watched flourish in the 1960s.⁴²² Among other things, the *Review* espoused libertarian ideas.⁴²³ And, once again, the free market was the marvel that promoted traditional values.⁴²⁴ Conservatives also began to bash the "liberal news media," which admittedly played a role in the liberal legal network's ascent in the 1960s and 1970s.⁴²⁵ Rush Limbaugh became a

416. See TUSHNET, *supra* note 8, at 10.

417. *Id.* Thus, those who supported smaller government won, while those who were against abortion, gay rights and race-conscious programs lost. *Id.* Micklethwait and Wooldridge divide up conservatives into social conservatives and antigovernment conservatives. MICKLETHWAIT & WOOLDRIDGE, *supra* note 369, at 40.

418. See, e.g., JOSEPH CRESPINO, IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION (2007); DONALD T. CRITCHLOW, THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY (2007); WILLIAM A. LINK, RIGHTEOUS WARRIOR: JESSE HELMS AND THE RISE OF MODERN CONSERVATISM (2008); LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT (2001); RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S (Bruce J. Schulman & Julian E. Zelizer eds., 2008).

419. MICKLETHWAIT & WOOLDRIDGE, *supra* note 369, at 48.

420. *Id.* at 49-50.

421. *Id.* at 77.

422. *Id.* at 50.

423. *Id.* at 50-51. It also attempted to join traditionalism, libertarianism, and anticommunism into a cohesive theory. *Id.* at 51.

424. *Id.*

425. TELES, *supra* note 364, at 53.

conservative media phenomenon, calling into question conservative complaints about the liberal media.⁴²⁶

While ideas about the free market and cutting big government worked well with traditional conservatives, conservative Republicans used race as a wedge into the Southern Democratic Party and to reach out to northern urban whites. After the Civil War, the vast majority of southern whites were loyal Democrats.⁴²⁷ John Micklethwait and Adrian Wooldridge assert that they would have remained Democrats, absent the Civil Rights movement in the 1960s.⁴²⁸ In particular, they argue that the Civil Rights Act of 1964 (which included Title VII) and Barry Goldwater changed southern whites' political views.⁴²⁹ To gain white southern votes in his 1964 presidential campaign, Goldwater used states' rights arguments that, to southern ears, would have permitted continued segregation.⁴³⁰ His strategy proved effective—he received an unprecedented 55% of the southern white vote.⁴³¹ As Micklethwait and Wooldridge summed it up, “The civil rights revolution turned the bulk of southern whites into loyal Republicans when it came to presidential elections.”⁴³²

The Court successes of the liberal legal movement, including many during the Warren Court, upset conservatives and fostered a legal and societal countermobilization.⁴³³ Indeed, in his 1968 campaign, Richard Nixon asserted that he would stop the Warren Court's activism by appointing “law and order” Justices.⁴³⁴ Particular decisions by the Warren Court helped conservatives gain momentum in other parts of the country:

For many working-class Americans in the big cities the biggest judicial outrage of all was court-ordered busing. Busing struck most ordinary people as both unfair and hypocritical: unfair because children were forced against their will to travel miles in order to achieve “racial balance”; hypocritical because the “liberal elites”

426. MICKLETHWAIT & WOOLDRIDGE, *supra* note 369, at 112.

427. *Id.* at 52.

428. *Id.* I have left social conservatives out of this discussion, because their link to the shift is not apparent. While social conservatives such as the Moral Majority and Phyllis Schlafly's Eagle Forum certainly were spurred on by some liberal successes (in particular, legalized abortion and the Equal Rights Amendment, respectively), their effect on outcomes of antidiscrimination cases before the Supreme Court is less than clear. *See id.* at 83-85, 80-81. Indeed, as Tushnet has pointed out, social conservatives have not been as successful in furthering their agenda. TUSHNET, *supra* note 8, at 10. Micklethwait and Wooldridge posit that conservative politicians, such as Newt Gingrich, Ronald Reagan and George W. Bush, have had an uneasy relationship with social conservatives, often not furthering their agenda. *See* MICKLETHWAIT & WOOLDRIDGE, *supra* note 369, at 92, 114 (Reagan); 116 (Gingrich); 148-49, 309 (Bush).

429. MICKLETHWAIT & WOOLDRIDGE, *supra* note 369, at 53-54.

430. *Id.* at 54.

431. *Id.* Goldwater carried five states in the South. *Id.*

432. *Id.* at 85.

433. TELES, *supra* note 364, at 60.

434. *Id.*

that supported the policy usually sent their own children to private or suburban schools.⁴³⁵

Busing in school desegregation cases, the Warren Court's pro-criminal defendant decision making, and many civil rights riots in northern cities fueled conservatives even further.⁴³⁶

Thus, race played a part in the modern conservative movement.⁴³⁷ While modern conservatism encompasses other ideas,⁴³⁸

[i]t [is] hard to deny the racial content of modern conservatism when, for example, Reagan had campaigned for president in the turning-point 1980 election by denouncing repeatedly a Chicago "welfare queen" and advocating "state's rights" on the stump in Philadelphia, Mississippi, location of ... some of the most highly publicized civil rights murders of the 1960s.⁴³⁹

The role of race in the modern conservative movement is further supported by the success of Richard Nixon's racial strategy in the 1970s, which fueled white racial resentment,⁴⁴⁰ and the Supreme Court's busing cases, which caused working class whites to turn to the Republican Party.⁴⁴¹ Thus, while conservatism is associated with ideas that do not involve race,

[s]tudies of conservatism have yet to acknowledge fully that much of the rise of the New Right was based on a dispute over the meaning of equality, how Americans

435. MICKLETHWAIT & WOOLDRIDGE, *supra* note 369, at 65.

436. *Id.*

437. See Robert J. Norrell, *Modern Conservatism and the Consequences of Its Ideas*, 36 REVS. AM. HIST. 456, 457 (2008).

438. For example, it was concerned with large government, communism, and the ascendancy of Judeo-Christian moral values. *Id.* at 457-58. Some of these conservative values have not withstood the test of time. For example, modern conservatives cannot rely on "communist threats," and Republican presidents, such as George W. Bush, have been some of the biggest big government spenders. See *id.* at 466. Thus, while some of the moral issues continue to be politically viable, some of these themes do not resonate with Americans as they did in the 1950s and 1960s. This leaves racial issues as a common thread.

439. *Id.* at 457. Philadelphia, Mississippi was near the location where J.E. Chaney, Michael Schwerner, and Andrew Goodman were arrested while investigating the burning of Mount Zion United Methodist Church. The Church was used as part of the "Freedom Summer" project as a place to register black voters. After their arrest, the three men left the county and were eventually killed by members of the Ku Klux Klan. HOWARD BALL, *JUSTICE IN MISSISSIPPI: THE MURDER TRIAL OF EDGAR RAY KILLEN* 35-38 (2006).

440. Nixon appealed to white resentment by arguing that blacks were receiving "special treatment," while at the same time advancing race-conscious programs that further fueled those resentments. Norrell, *supra* note 437, at 464. See also Thomas J. Sugrue & John D. Skrentny, *The White Ethnic Strategy*, in *RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S*, *supra* note 418, at 171 (discussing in detail Nixon's "white ethnic" strategy).

441. See Norrell, *supra* note 437, at 464-65.

define equality of opportunity, [and] how far we are willing to go to give everyone about the same chance at a good life.⁴⁴²

So, it should come as no great surprise that the modern conservative movement took on antidiscrimination issues such as race-conscious programs, and that the shift in the Court can be accounted for in part by these political and social shifts in American society.

Views of equality are reflected in one underlying belief that is common among conservatives: Discrimination in American society has lessened or no longer exists.⁴⁴³ Certainly, some popular commentary has picked up on this theme.⁴⁴⁴ Yet, studies show that discrimination and inequality are persistent and disturbing features of American society.⁴⁴⁵ While instances of blatant racism have become less socially acceptable,

442. *Id.* at 466.

443. *See* Selmi, *supra* note 2, at 340-42. Others argue that this is the modern version of racism:

The central tenets and beliefs of modern racists include the thinking that discrimination is a thing of the past, Blacks are using unfair tactics to push themselves into places where they are not wanted, and gains by Blacks are not deserved. Modern racists see their beliefs as constituting empirical facts.

Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCHOL. 553, 554 (2005) (citations omitted).

444. *See, e.g.*, DINESH D'SOUZA, *THE END OF RACISM* 252 (1995) (arguing that racial stereotypes are in some cases "rational"); Morrison, *supra* note 326, at 324 & n.82 ("Victory over racism is an accomplished fact."). It is worth noting that Dinesh D'Souza has connections to many of the conservative organizations described in this section. He was an acting editor of the Heritage Foundation's *Policy Review*, was an Olin Scholar at the American Enterprise Institute, and is now at the Hoover Institution. MICKLETHWAIT & WOOLDRIDGE, *supra* note 369, at 169.

445. *See* Selmi, *supra* note 2, at 341 & nn.283-86 (citing studies). *See also* U.S. CENSUS BUREAU, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007*, at 7 tbl.1, 13 tbl.3 (2008). The U.S. Census Bureau data shows an estimated median income for female family householders with no husband present at \$33,370 for 2007. *See id.* at 7 tbl.1. The comparable income for a male householder with no wife present is \$49,839. *See id.* In addition, the estimated median income for blacks was \$33,916 for 2007, whereas the income for whites was \$52,115. *See id.* Poverty rates are estimated as much higher for blacks and Hispanics than whites (24.5% and 21.5% respectively as compared to 10.5%). *See id.* at 13 tbl.3. Likewise, poverty rates for female family householders with no husband present are 28.3% while the rate for comparably situated male family householders is 13.6%. *See id.* *See also* R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169, 1184 (2006) (summing up various inequities based on race that persist); Michael L. Birzer & Jackquice Smith-Mahdi, *Does Race Matter? The Phenomenology of Discrimination Experienced Among African Americans*, 10 J. AFR.-AM. STUD. 22, 23-24 (2006) (summing up research on discrimination directed at African Americans in U.S. and describing their own research on the same); Elizabeth A. Deitch et al., *Subtle Yet Significant: The Existence and Impact of Everyday Racial Discrimination in the Workplace*, 56 HUM. REL. 1299 *passim* (2003) (study finding that race was significantly related to mistreatment at work, with blacks perceiving more on the job mistreatment than whites); Jack Glaser, *Intergroup Bias and Inequity: Legitimizing Beliefs and Policy Attitudes*, 18 SOC. JUST. RES. 257, 257 (2005) (discussing studies documenting group-based inequities in the post-civil rights era).

[r]esearch, however, has shown that racism is not disappearing, but rather is being replaced by less overt forms These forms of racism allow for individuals to hold racist views while buttressing such views with non-racially based rationales (e.g. beliefs in opportunity and individual mobility), thus maintaining a view of themselves as nonprejudiced. But despite modern racists' assertions that they are not "prejudiced," modern racist views can predict discriminatory behaviors.⁴⁴⁶

Public opinion, at least among white Americans, however, tends to mirror the Court's approach. White Americans tend to believe that racism is no longer a problem in American society.⁴⁴⁷ And indeed, surveys suggest that overt racism and sexism have declined.⁴⁴⁸ As Professor Mary Ellen Maatman argues, "the old antihero of antidiscrimination jurisprudence, the overtly racist and segregationist employer, has been replaced with a new antihero: the unqualified woman or minority unfairly obtaining or retaining a job by threat of litigation."⁴⁴⁹

Despite these perceptions, there is a wealth of material discussing discrimination's pervasiveness,⁴⁵⁰ "unconscious bias,"⁴⁵¹ sometimes called "implicit bias,"⁴⁵² and other forms of bias.⁴⁵³ Many legal scholars have criticized law's failure to account for implicit bias.⁴⁵⁴ Indeed, based on evidence of implicit bias, Greenwald and Krieger argue that race bias partly causes racial

446. Dietch et al., *supra* note 445, at 1301 (internal citations and footnote omitted).

447. See Maatman, *supra* note 10, at 54-55, 60 & n.393, 61 n.395 (citing studies); Lawrence, *supra* note 181, at 375 (citing Joel Kovel's *WHITE RACISM: A PSYCHOHISTORY* (1970)).

448. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5-6 & nn.12-14 (2006) (citing surveys).

449. Maatman, *supra* note 10, at 58 (footnote omitted).

450. See Krieger, *supra* note 55, at 1202 n.179 (citing empirical evidence supporting that Americans categorize by race, sex, and ethnicity).

451. Perhaps the most famous discussion of this is Charles Lawrence's Stanford Law Review article. See Lawrence, *supra* note 181.

452. See, e.g., Krieger & Fiske, *supra* note 20. Krieger and Fiske sum up the state of knowledge in this area well.

The enormous body of researching examining the influence of implicit stereotypes on social judgments yields a set of key empirical findings that challenge the conception of discrimination embedded in disparate treatment doctrine. Subtle forms of intergroup bias can infiltrate decision making long before any decision is made. These biases can latently distort the perceptual data set on which that decision is ultimately premised. Often operating outside of the decision maker's attentional focus, and therefore outside his or her awareness, stereotypes can covertly but powerfully influence the way information about the stereotyped target is processed and used. They can shape the interpretation of incoming information, influence the manner in which that information is encoded into and stored in memory, and mediate the ease or difficulty with which the information is retrieved from memory and used in social judgment. A decision maker can act because of or on the basis of a target person's race, sex, or other group status, which subjectively believing that he or she is acting on the basis of some legitimate, nondiscriminatory reason.

Id. at 1034.

453. See, e.g., Lawrence, *supra* note 181, at 335 & n.73 (describing "aversive racism").

454. See, e.g., Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 978 n.45 (2006) (citing many articles).

disparities in many aspects of American life.⁴⁵⁵ Thus, the idea that bias exists and is widespread is fairly uncontroversial. The real issue is law's failure to take account of it.

For purposes of shift cases, other important aspects of modern conservatism are libertarianism and reliance on market theory.⁴⁵⁶ While the links to the development of antidiscrimination law are more subtle here, both these theories focus on the individual and meritocracy as sources of societal good (and ill). The Cato Institute is one of the main libertarian think tanks.⁴⁵⁷ Its emphasis on arguments related to meritocracy and the market suggests an individualism that is mirrored in much of the case law.⁴⁵⁸ Another group with influence in this area is what Micklethwait and Wooldridge have dubbed the "neocons," who, akin to the Cato Institute, believe in "old-fashioned liberalism—the liberalism of meritocratic values, reverence for high culture and a vigorous mixed economy."⁴⁵⁹ This movement was spurred not by elite Ivy League men, but instead by the sons of Jewish immigrants who engaged in a more modern version of conservatism (hence, the "neocon" moniker).⁴⁶⁰ One of the neocons' distinctive aspects was their use of social science to question Great Society legislation.⁴⁶¹ These thinkers provided conservative politicians and the public with justifications for shifts in their thinking about equality. So, to a certain extent, decisions may be influenced by shifts in thinking by the American public, reflected in modern conservatism. Certainly, President Ronald Reagan's judicial appointments reflected this more conservative trend.

V. CONCLUSION

Although civil litigation is in many ways highly technical, at the end of the day, lawsuits tell stories. Because judicial opinions incorporate popular, taken-for-granted assumptions about the common nature of things, they function as a society's core stories; they offer an interpretation of experience and provide the participants of future lawsuits a narrative comprising a set of easily recognized plots, symbols, themes, and characters.⁴⁶²

455. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 966 (2006). Implicit bias theory is not without its detractors. Psychologist Frank Landy has argued that the implicit bias shown by the implicit association test does not necessarily translate into actions based on stereotypes, especially where the decisionmaker has individuating information. See Frank J. Landy, *Stereotypes, Bias, and Personnel Decisions: Strange and Stranger*, 1 INDUS. & ORGANIZATIONAL PSYCHOL. 379, 383-85 (2008).

456. See MICKLETHWAIT & WOOLDRIDGE, *supra* note 369, at 64.

457. *About Cato*, CATO INSTITUTE, <http://www.cato.org/about.php> (last visited Nov. 7, 2010).

458. The Cato Institute's mission "is to increase the understanding of public policies based on the principles of limited government, free markets, individual liberty, and peace." *Cato's Mission*, CATO INSTITUTE, <http://www.cato.org/about-mission.html> (last visited Nov. 7, 2010).

459. MICKLETHWAIT & WOOLDRIDGE, *supra* note 369, at 71-72.

460. *Id.*

461. *Id.* at 73.

462. Krieger & Fiske, *supra* note 20, at 1024.

Right now, according to the Supreme Court, the plot line in discrimination cases is that discrimination is a thing of the past—a rare phenomenon caused by individual bad actors. While this idea may be comforting to the many Americans in the majority, it does little to lessen the continued inequity that exists in American society.

Tracing the Court's rhetoric in the areas of equal protection and employment discrimination law reveals a shift in the Court's approach to discrimination on a variety of levels. The Court has shifted from presuming discrimination to presuming non-discrimination, absent compelling evidence to the contrary. In addition, not only must plaintiffs in court present this compelling evidence, but also Congress must provide increasingly compelling evidence of discrimination to justify legislating remedies for continuing discrimination it perceives in American society under its Section 5 powers. Even in the area of race-conscious programs, the Court has accepted a rationale that does not take into account the lingering effects of discrimination and the present effects of implicit biases.

The reasons for this shift are many and encompass a complex set of social and political circumstances. Shifts in Court personnel no doubt provide some immediate explanations for the shifts in the case law. However, they reflect a larger legal, political, and social conservatism that is affecting who is appointed to the Court and how cases are decided. Conservative public interest law firms have provided the cases necessary for the shift. The rise of social and political conservatism, with its links to race and equality issues, provides the support for Presidents to appoint Justices who are inclined to see discrimination as either a problem of the past or a problem so intractable that courts are the wrong fora in which to remedy the problem.⁴⁶³

While many Americans may believe race and sex discrimination have lessened and even disappeared, the continuing inequity in American society suggests otherwise. The rise of compelling scholarship on implicit bias suggests that racism and sexism will remain salient in predicting attitudes among Americans. Thus, the Court's functional abandonment of presumptions of discrimination, as well as its failure to acknowledge and account for societal discrimination in its modern antidiscrimination jurisprudence, leaves race and sex

463. In his description of life at the Supreme Court, former Blackmun clerk Edward Lazarus gives some suggestion of this in his account of Justice Scalia's thinking on the evidence in *McCleskey v. Kemp*:

In Scalia's view, Powell had pinned too much on wrongly alleged weaknesses in the Baldus study, as if a better statistical showing might have carried the day. "Since it is my view," he wrote, "that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof." In other words, Scalia basically agreed with the LDF that some racial bias in capital sentencing was inevitable. He was, however, willing to tolerate that bias and even thought that the other Justices, in candor, should admit they were too.

EDWARD P. LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 211 (1998).

discrimination plaintiffs without remedies and tells a story that fails to acknowledge their lived experiences.